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ABSTRACT

This report contains digests of 171 of 265 court decisions concerning students which were compiled from court decisions published in the National Reporter System during the calendar year 1970. The decisions on school desegregation and permissible length of male students' hair have been reported here on a selective basis because of the volume and the number of repetitive issues. Those desegregation cases and hair style cases for which digests do not appear are listed by name and citation under the major issue or principle involved. The 171 decisions digested in this compilation are from 39 states and the District of Columbia and are primarily of a civil nature. The case digests are classified under seven headings: (1) Admission and attendance, (2) School desegregation, (3) Student discipline, (4) Student injury, (5) religion/sectarian education, (6) transportation, and (7) miscellaneous. (Author/RK)

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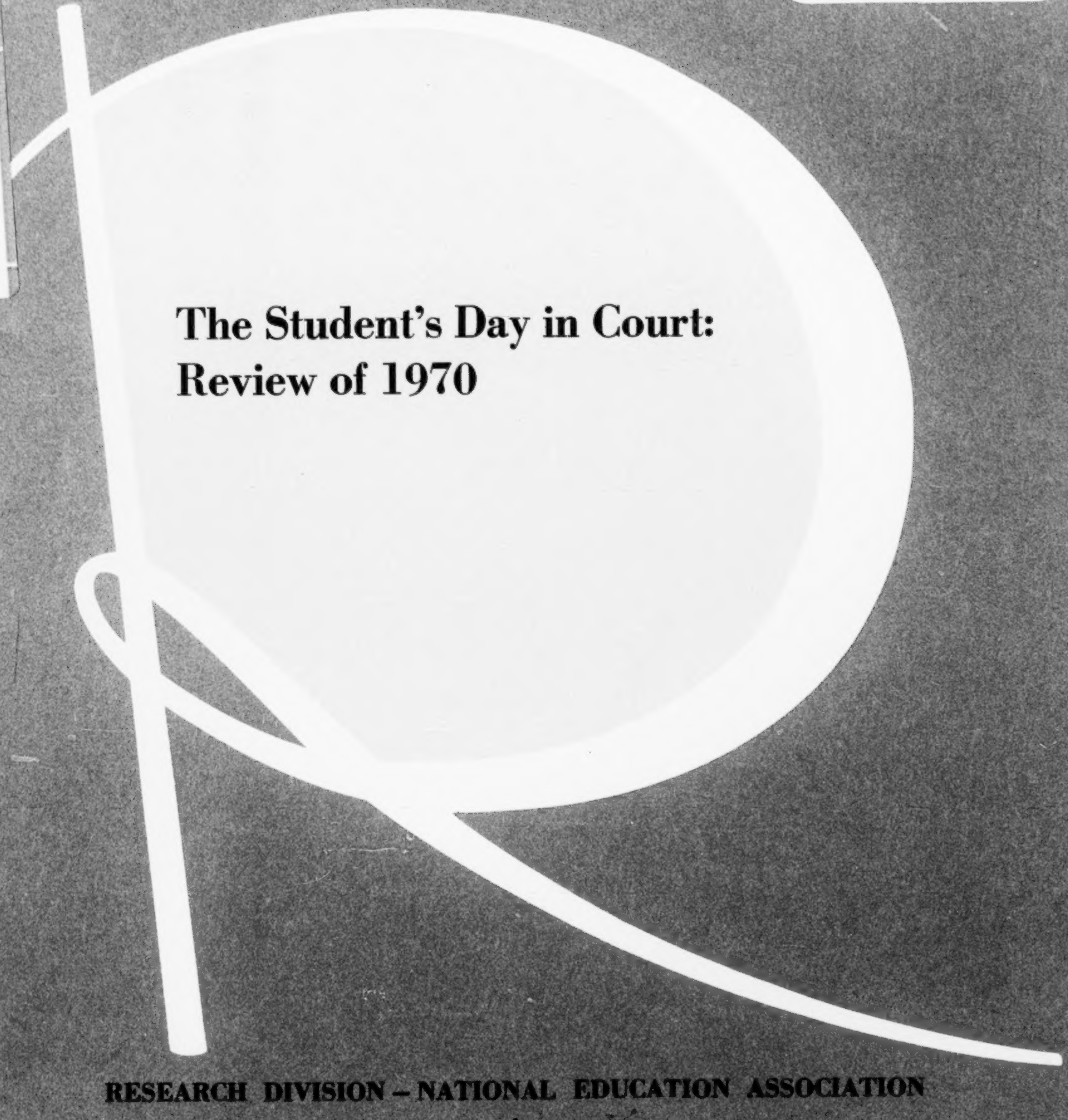

The Student's Day in Court: Review of 1970

CG 007 000

RESEARCH DIVISION – NATIONAL EDUCATION ASSOCIATION

School Law Series

RESEARCH REPORT 1971-R8

The Student's Day in Court: Review of 1970

An Annual Compilation

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Research Report 1971-R8: *The Student's Day in Court: Review of 1970*

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FOREWORD

MORE THAN EVER BEFORE there is resort to the courts to settle controversies over the constitutional and legal rights of students. This is evident in the greatly increased volume of court decisions during 1970, not only in the context of school desegregation, but also with respect to issues relating to the regulation of student dress and appearance, the exercise of First Amendment rights by students in the school setting, the rights to due process in disciplinary matters, and the constitutionality of public funds to aid nonpublic schools and nonpublic-school students. These decisions extend beyond the original litigants and provide principles and guidelines on the scope of the legal rights of students and the power and authority of school boards relative to these rights in the exercise of their responsibilities to maintain and operate the schools. Therefore, the decisions covered in this publication should be useful to those engaged in or interested in education.

This compilation contains those court opinions published during 1970 where public elementary- or secondary-school pupils or students at tax-supported institutions of higher education were plaintiffs or defendants and those cases directly affecting such students.

This report was prepared by Jeanette G. Vaughan, Senior Staff Associate, under the general direction of Frieda S. Shapiro, Assistant Director, NEA Research Division.

Glen Robinson
Director, Research Division

INTRODUCTION

THIS REPORT contains digests of 171 of 265 court decisions concerning students which were compiled from court decisions published in the *National Reporter System* during the calendar year 1970. The decisions on school desegregation and permissible length of male students' hair have been reported here on a selective basis because of the volume and the number of repetitive issues. Those desegregation cases and hair style cases for which digests do not appear are listed by name and citation under the major issue or principle involved.

The 171 decisions digested in this compilation are from 39 states and the District of Columbia. All but three are of a civil nature. The exceptions involve two contempt charges, one against parents for failing to send their son to the school to which he was assigned and the other against the student body president of a state university for disobeying a court order regarding campus speakers. The third exception concerned the admissibility of evidence seized from a student's locker. The state courts are represented by 57 decisions, 24 of them from the highest court in the state where the action began, 17 from intermediate appellate courts and 16 from trial courts. The federal judiciary produced 114 decisions, 36 from the circuit courts of appeal and 76 from federal district courts; in addition to summary actions, two decisions were handed down by the Supreme Court of the United States, both involving school desegregation.

Prior to 1968 almost all of the federal decisions related to school desegregation questions. In the past three years, however, an increasing number of the federal cases have concerned issues of student discipline and student rights. This topic area shares in the substantial increase in the number of cases reported this year.

The case digests in this compilation are classified under seven headings: (a) admission and attendance, (b) school desegregation, (c) student discipline, (d) student injury, (e) religion/sectarian education, (f) transportation, and (g) miscellaneous. Also, student discipline is further divided into four subsections reflecting the major areas into which these cases fall. The decisions are arranged by state under each topic; within states they are listed alphabetically by title. Where there is more than one decision by the same title, the decisions are arranged by date. Table 1 lists the case digests by state and the major issue raised. Table 2 indicates the state of origin of those cases for which digests do not appear.

School Desegregation

As has been the pattern in previous years, school desegregation in 1970 exceeded any other issue litigated by students. Of the 265 decisions that appeared this year, 119 were related to school desegregation, and all but three were rendered in the federal courts. Forty-seven of these decisions are summarized in this publication, and the remainder listed by name and citation. These 119 decisions in no way reflect the continuing large volume of court concern with desegregation matters or the number of school systems involved. Some cases involved more than one school system, and other cases heard and decided in 1970 have not appeared as published decisions during the 1970 calendar year in the *National Reporter System*. In addition, many of the lower federal court decisions are not published.

The school desegregation decisions extend over 20 states with eight of the states being outside the south. However, these eight states account for only 10 of the cases. Two of the 10 concerned the Denver, Colorado, public schools where federal courts previously found purposeful segregation of black and Hispano students. In the decisions this year, the Denver school board was permanently enjoined from operating a segregated system and was directed to put into effect a court-approved desegregation plan. A northern case was that of District 151 in Cook County, Illinois. The school board had appealed from a lower federal court finding of deliberate segregation. The appellate court affirmed the lower court order and directed the school board to implement the desegregation plan approved by the lower court. Purposeful segregation of students and faculty was also found in Pontiac, Michigan. The school board there was directed to submit a comprehensive plan for the complete integration of the system.

In other cases outside the south, parents sought to enjoin reassignments of students and bussing in Prince Georges County, Maryland, and Niagara Falls, New York. In the New York case a state court ruled that the school-board reassignment plan was within the board's jurisdiction to implement. The Maryland case was remanded to the trial court for further findings of fact.

Many school desegregation decisions this year revolved around the Supreme Court decision in *Alexander v. Holmes County Board of Education* (90 S.Ct. 29 (1969)) which held that additional time for implementation of school desegregation plans was impermissible and that school districts must integrate their dual school systems immediately. Also important this year was the decision of the Fifth Circuit Court of Appeals, issued on December 1, 1969, in *Singleton v. Jackson Municipal Separate School District*. In that case the appellate court set out guidelines regarding desegregation for school districts in its circuit that would be the minimum acceptable by February 1, 1970. The guidelines covered integration of the students, faculties, staffs, transportation systems, athletics, and extracurricular activities. The court originally gave the school districts one extra semester to integrate the student bodies of the schools, but this portion of the decision was reversed by the Supreme Court of the United States in light of the *Alexander* hold-

TABLE 1–MAJOR ISSUES INVOLVING PUPILS IN 1970 FOR WHICH CASE DIGESTS APPEAR

State	Admission and attendance	School desegregation[a]	Student Discipline				Student injury	Religion/ sectarian education	Transportation	Miscellaneous	Total decisions
			Dress and appearance[a]	Protest and demonstrations	Publication and distribution of literature	Other disciplinary activities					
1	2	3	4	5	6	7	8	9	10	11	12
Alabama	...	4	1	...	...	...	...	...	...	1[b]	6
Arizona	1	...	...	...	...	1	1	...	...	...	3
Arkansas	...	3	2	...	...	...	...	...	...	1[c]	6
California	...	2	1	2	1	1	1	...	...	...	8
Colorado	...	2	1	...	...	...	1	...	...	...	4
Connecticut	...	...	1	...	1	...	...	1	...	1[c]	4
District of Columbia	...	...	...	...	...	...	1	...	...	...	1
Florida	...	1	...	3	...	...	...	...	...	1[d]	5
Georgia	...	2	...	...	...	...	...	...	...	...	2
Idaho	...	...	...	...	...	...	...	...	...	1[e]	1
Illinois	...	1	1	...	1	1	...	...	...	...	4
Iowa	...	...	1	...	...	...	1	...	...	...	2
Louisiana	...	3	...	...	...	...	2	1	...	2[b]	8
Maine	...	...	1	...	...	...	...	1	...	...	2
Maryland	...	1	...	...	1	...	1	...	...	1[f]	4
Massachusetts	1	1	...	...	1	1	...	2	...	...	6
Michigan	...	1	...	...	1	1	1	1	...	1[e]	6
Minnesota	...	...	...	...	...	1	1	...	...	...	2
Mississippi	...	7	...	...	...	1	...	...	...	3[g]	11
Missouri	...	...	...	1	...	...	...	...	...	...	1
Montana	...	...	...	...	...	...	...	1	...	...	1
Nevada	...	...	...	...	...	...	1	...	...	...	1
New Hampshire	...	...	1	...	...	1	...	...	...	...	2
New Jersey	...	...	...	...	...	1	...	1	1	...	3
New York	3	1	1	5	...	1	5	...	...	5[h]	21
North Carolina	...	9	...	...	...	...	...	...	...	...	9
Ohio	...	1	1	...	...	...	...	...	...	...	2
Oklahoma	3	1	1	...	...	...	...	...	...	...	5
Oregon	...	...	...	...	...	...	1	...	...	...	1
Pennsylvania	...	...	1	1	...	...	...	2	...	...	4
Rhode Island	...	...	...	...	...	...	...	1	...	...	1
South Carolina	1	...	...	...	..	...	...	1	...	...	2
Tennessee	1	4	...	1	1	...	...	...	...	...	7
Texas	1	1	4	1	2	...	...	...	...	1[i]	10
Vermont	...	...	1	...	...	...	...	...	...	...	1
Virginia	1	2	...	2	...	...	...	1	...	1[c]	7
Washington	...	...	...	...	...	...	2	...	...	...	2
West Virginia	...	...	...	...	...	...	...	...	1	...	1
Wisconsin	...	...	1	3	...	...	...	...	...	...	4
Wyoming	...	...	...	1	...	...	...	...	...	...	1
Total number of decisions	12	47	20	20	9	10	19	13	2	19	171

[a] See Table 2 for cases reported by name and citation only.

[b] Concerned high-school athletic programs.

[c] Involved a college campus organization.

[d] Questioned the constitutionality of the state financing program.

[e] Concerned mandatory public-school fees.

[f] Parents' suit to enjoin sex-education program.

[g] Involved regulation of campus speakers.

[h] Three cases concerned tuition and fees at state institutions of higher education, one concerned the search of a student's locker, and the fifth involved a graduate student's suit for a state fellowship.

[i] Action concerning rights of high-school students to join fraternities and sororities.

TABLE 2–CASES REPORTED BY NAME AND CITATION ONLY

State	School desegregation	Hair style	Total
1	2	3	4
Alabama	10	...	10
Arkansas	5	...	5
California	...	1	1
Colorado	...	1	1
Connecticut	...	1	1
Florida	10	1	11
Georgia	9	1	10
Illinois	...	2	2
Louisiana	17	...	17
Massachusetts	...	1	1
Minnesota	...	1	1
Mississippi	7	1	8
Missouri	...	2	2
Nebraska	...	2	2
North Carolina	2	...	2
Ohio	...	1	1
Oklahoma	1	...	1
South Carolina	2	...	2
Tennessee	2	2	4
Texas	4	4	8
Virginia	3	...	3
Wisconsin	...	1	1
Total number of decisions	72	22	94

ing. The remainder of the appellate court decision was affirmed. Subsequent to this decision, school systems in the Fifth Circuit and elswewhere had their desegregation plans measured against the standards of *Singleton*. Those systems whose desegregation plans did not meet the requirements of *Singleton* were remanded to the district courts for further proceedings.

On April 20, 1971, prior to the time that this publication went to press, the Supreme Court of the United States decided the case of *Swann v. Charlotte–Mecklenburg Board of Education* (91 S.Ct. 1267). The district court had directed implementation of a desegregation plan that required limited use of mathematical ratios, pairing, grouping of noncontiguous school zones, and cross-bussing. The Court of Appeals for the Fourth Circuit affirmed the plan except as it required bussing of elementary-school pupils. On appeal, the Supreme Court reinstated the order of the district court, including the bussing of the elementary-school pupils. With regard to transportation, the Supreme Court held that although there might be valid objections to bussing, in this instance the relief granted was within the power of the district court to order and within the capacity of the school board to implement. In another 1971 decision handed down the same day and involving the same parties, the Supreme Court affirmed the lower federal court decision holding the North Carolina anti-bussing law unconstitutional. Also decided the same day was the case of *Davis v. Board of School Commissioners of Mobile County* (91 S.Ct. 1289). Here the city was divided by a major highway and in formulating a desegregation plan the appellate court had treated the eastern and western sections of the city separately. The Supreme Court reversed the lower court because of inadequate consideration given to possible use of transportation and split zoning.

Four cases of interest are those in which attempts were made in Arkansas, North Carolina, and Virginia to carve new school districts out of existing ones. The plaintiffs argued that the purpose of the new districts was to preserve white enclaves or to achieve an "acceptable white ratio." Proponents of the attempts in all four cases argued that avoidance of integration was not the reason for the new districts. However, the four federal courts that considered the issue found that the new districts would create racial imbalance in the former districts and in some cases would create a financial hardship on the former district. The local attempts in Arkansas and Virginia and the two special enactments of the North Carolina legislature involving two school districts were struck down and the operation of the proposed new districts was enjoined. The decisions in the Virginia case and in one of the North Carolina cases were reversed by the Fourth Circuit Court of Appeals, and appeals have been filed in the Supreme Court of the United States.

One of the three school desegregation cases decided by a state court involved a decision by the Supreme Court of Georgia declaring the desegregation plan of the Clarke County school board unconstitutional. Since desegregation could not be accomplished by geographic zoning alone, the board had assigned five "pockets" of black children to schools outside their zones. The state court found that the white and black school children in whose behalf suit was brought were being effectively excluded from some schools because of their race in violation of the Fourteenth Amendment. In 1971 the Supreme Court of the United States reversed this decision, saying that to remedy segregation, pupils must be assigned differently because of their race.

Neighborhood school assignments were approved by the United States Court of Appeals for the Fifth Circuit in *Ellis v. Board of Public Instruction of Orange County, Florida*, but only if children were assigned to the school nearest their residence, subject only to the capacity of the school, and then to the next nearest school. Under this decision, variances would not be permitted by arbitrary zone lines or for reasons of traffic, for such variances might destroy the integrity and stability of the entire neighborhood assignment plan.

Also noteworthy among the school desegregation decisions was the issuance by a three-judge federal court of a preliminary injunction enjoining the Internal Revenue Service from issuing any further rulings regarding the tax-exempt status of private elementary and secondary schools in Mississippi until IRS determined that the school did not discriminate in its admission policies. In Alabama, a federal district court held unconstitutional a state enactment barring school district zone lines or attendance units being altered to achieve racial balance. In two instances, appellate courts found it necessary to remand cases to district courts in Arkansas and Louisiana with the direction that integrated schools also means integrated classrooms. The school boards in both cases had left racially identifiable classes in integrated schools.

Pupil Discipline

School-board regulation of dress and appearance of students produced an increased volume of decisions with 42 cases falling into this category. Of these, 20 are covered in digest form in this report. Most of the cases under this topic heading involve the length of male students' hair. Some of the courts that considered the issue have held that students do have a constitutional right under either the First or Ninth Amendment to wear their hair as they wish. To impair this freedom the state must bear "a substantial burden of justification" for its action. This reasoning is from a federal court decision in *Breen v. Kahl*, where the Williams Bay, Wisconsin, school-board regulation against long hair was declared unconstitutional. But even when the reasoning in *Breen* has been followed, the decisions have not been favorable to the students where there was evidence of substantial disruption to the educational process caused by the long hair.

Other courts have ruled against the students, often citing *Ferrell v. Dallas Independent School District* (392 F.2d 697 (1968)) which upheld a school district regulation banning long hair. That decision did not find a constitutionally protected right to wear one's hair as one pleased nor did it place the burden of justifying the regulation on the school officials.

Three cases in the section on student appearance unconcerned with hair styles turned on the Supreme Court ruling in *Tinker v. Des Moines Independent Community School District* (89 S.Ct. 733 (1969)). The first was occasioned when an East Cleveland, Ohio, high-school student wore a button to school, advertising an antiwar demonstration. In holding *Tinker* inapplicable to this case, the federal appellate court sustained a long-standing high-school rule against buttons since substantial disruption had occurred in the past when students wore buttons to school. The other two cases, both from Texas, concerned armbands students wore to school. In the first case, a federal district court ruled that Mexican-American students could wear brown armbands to school to express support for attempts to change certain school policies and practices. The court said that there was no showing that this act would cause the interference and disruption mentioned in *Tinker*. However, the second Texas federal district court did find disruption and interference and upheld the Dallas school-board regulation against black armbands worn to protest the Vietnam war.

Twenty student discipline cases were occasioned by protests and demonstrations, brought mostly by college students although some involved junior and senior high-school students. However, two suits were initiated by colleges to restrain disruptive student activity and two more were brought by students at institutions shut down by protests. In one of these, students at Queens College in New York sought an injunction to compel the college to conduct classes as usual. The other was a suit for damages by University of Wisconsin students because of the closing of two campuses of that institution.

Publications on campus, authorized or unauthorized, played a part in nine decisions. The students, either in high school or college, were successful in seven of these instances. Where underground publications written and published by students did not cause disruption or materially interfere with the educational process, courts in California, Illinois, Massachusetts, and Texas held that freedom of the press and freedom from prior restraint applied to these publications. One of the cases where suspended students were not ordered reinstated was in California. In this instance the publication contained profane and vulgar expressions and had caused interruptions and distractions in the classroom. Another case arose when the University of Maryland effectively stopped publication of the cover of a student magazine by refusing to pay the printing bill. The banned cover was a picture of a burning American flag. A three-judge federal court held that in the absence of any showing that supression of the cover was necessary to preserve order on campus, the state statute prohibiting desecration of the flag was unconstitutionally applied to the publication by the university.

Pupil Injury

Injuries to students resulted in 19 cases from 13 states in 1970. Two of the cases were wrongful death actions brought by parents of deceased high-school students. In the California case, the state supreme court reversed two lower court decisions against the student's parents and held that lack of supervision could, under California law, constitute a lack of ordinary care by those responsible for student supervision. In the Louisiana case, the state intermediate appellate court reversed a trial court verdict in favor of school officials and two coaches, and awarded a judgment to the parents on a finding that the coaches were negligent in denying the student immediate medical attention. Also relating to student injury was a Michigan case where sovereign immunity was upheld as a defense in an action against a school district even though the district had purchased liability insurance.

Religious Issues

There was much litigation in this area during 1970 since several states had proposed or enacted legislation providing some type of state purchase of secular services from nonpublic schools or salary supplements to teachers in nonpublic schools. State courts in Louisiana, Maine, Massachusetts, and a federal district court in Rhode Island declared proposed or enacted legislation of this type of state aid to nonpublic schools unconstitutional as violative of the federal Constitution or religion clauses in the various state constitutions. The Michigan Supreme Court upheld recently enacted legislation providing for the purchase of secular educational services from nonpublic schools, but subsequently struck it down following an amendment to the state constitution prohibiting aid to parochial schools. Similar legislation enacted in Pennsylvania was upheld by a federal district court. However, the Supreme Court of the United States heard appeals from both the Rhode Island and Pennsylvania decisions and ruled in June 1971 that both statutes were unconstitutional under the establishment and free exercise clauses of the First Amendment because "the cumulative impact of the entire relationship arising under . . . [the statute] involves excessive entanglement between the government and religion" *Lemon v. Kurtzman; DiCenso v. Robinson* (91 S.Ct. 2105).

At the same time that the Pennsylvania and Rhode Island opinions were released, the Supreme Court affirmed a ruling by a federal district court in Connecticut, upholding the federal Higher Education Facilities Act of 1963. In a 5 to 4 decision, the Supreme Court held that the federal act did not violate the First Amendment even though some of the construction grants were to church-related institutions of higher education *(Tilton v. Richardson*, 91 S.Ct. 2091). Similar legislation on the state level in South Carolina, providing for the issuance of revenue bonds payable from the proceeds of leases with the receiving institutions to finance higher education facilities was upheld by the highest court of that state. On appeal to the Supreme Court, the judgment was vacated and the case remanded for consideration in light of the decisions in *Lemon* and *Tilton*.

Among other cases with religious issues were those in New Jersey, Pennsylvania, and Virginia, where religious exercises conducted in public schools were contested. The programs organized by the school districts in the first two cases were found unconstitutional under the test for permissible legislation in *School District of Abington Township v. Schempp* (82 S.Ct. 1261, (1963)). In the third case a private religious education group sent teachers into the schools to conduct religion classes. The federal district court found this practice unconstitutional because of the way that it was administered, but did set out guidelines for a permissible program to teach students about religion but not to teach religion.

Other Issues

Male students in South Carolina and female students in Virginia sought admission to state institutions of higher education traditionally reserved for members of the opposite sex. The federal district court in South Carolina ruled against the men, saying that a classification based on sex was permissible especially since there were other coeducational state institutions that the men were eligible to attend. On appeal, the decision was affirmed without opinion by the Supreme Court of the United States. The female students who brought suit sought admission to the University of Virginia. Following a preliminary hearing, the University adopted a plan for the admission of women. Because of the "prestige factor" not present at other state institutions, the federal court held that to deny the women admission to the University of Virginia would have been a denial of their constitutional rights. However, the court declined to go so far as to hold that the state may not operate any educational institution for one sex only.

Mandatory fees in public schools led to suits in Idaho and Michigan. The highest court in each state ruled that the provisions of the respective state constitutions providing for "free" public schools meant just that and the imposition and collection of the fees was unconstitutional.

A proposed program of sex education in the Baltimore County, Maryland, schools brought parents of school children into court to prevent implementation of the program. Contrary to the parents' contentions, a federal district court found no interference with the free exercise of religion or establishment of religion by the program. Upholding the program as a public health measure, the court dismissed the complaint of the parents.

Attempted regulation by college authorities of campus speakers was at issue in three Mississippi cases. In the first the *Stacy* case, two separate sets of regulations applicable to all state institutions were found unconstitutional by a federal district court which then fashioned its own regulations in accord with guidelines it had previously detailed. The second and third cases concerned the application of these regulations, and in both instances the students were successful in having their speaker requests judicially approved.

In another case of interest, Florida taxpayers sued in federal court, seeking to have a state statute limiting the millage rate of property taxes for educational purposes declared unconstitutional as a violation of the equal protection clause of the Fourteenth Amendment. The court granted the relief, finding a denial of equal protection. The Supreme Court heard an appeal in 1971 and vacated the decision. Without deciding the federal constitutional issues, the Supreme Court held that the lower federal court should have abstained from considering the case in deference to the proceedings filed in state court, challenging the statute on state constitutional grounds.

ADMISSION AND ATTENDANCE

Arizona

School District No. 3 of Maricopa County v. Dailey
471 P.2d 736
Supreme Court of Arizona, in Banc,
June 19, 1970.

Parents of three minor children, residing in Phoenix, wished their children to attend the plaintiff Tempe school district without payment of tuition. To accomplish this, they had a resident of the Tempe school district appointed legal guardian of the children although the children continued to reside with the parents. Prior to the appointment of the guardian, two of the children had attended the Tempe schools without the knowledge of the district that they were not residents. When the nonresidency was discovered during the 1967-68 school year, the district demanded tuition for the remainder of the year, which was paid by the parents "under protest." The district then refused to permit any of the children to attend the Tempe schools for the 1968-69 school year until the parents paid $1,700 back tuition. The guardian sought and was granted a writ requiring the school district to accept the children for the next school year. The Tempe school district appealed from this judgment.

The pertinent portion of the applicable statute provides that the residence of the person having custody of the pupil shall be the residence of the pupil. The guardian contended that this section is clear and that the children should be admitted without the payment of tuition. The court did not entirely agree, quoting from another case concerned with the definition of residence that held "being within the school district boundaries depends not so much on the technical requirements. . . but *upon the physical presence of the child.*" The court said that the legal custody referred to in the statute presupposes that the children are living in the district with legal sanction for their presence there. Since that was not the case here, it was clear to the court that the children were not entitled to attend school in the Tempe district without its permission and that the lower court finding that they were legal residents of Tempe was erroneous.

The lower court decision was reversed, and the case was remanded on the issue of tuition owed. State law permits the school district that accepts a nonresident child to prescribe the terms. Since the children had attended Tempe schools for a while without the knowledge of the district and then under the lower court order, now reversed, these terms had never been stated. On remand, proceedings were directed solely to determine the amount due from the parents to the Tempe school district.

Massachusetts

Armsden v. Cataldo
315 F.Supp. 129
United States District Court, D.Massachusetts,
June 22, 1970.

A student at Salem State College sued college officials, charging violation of his rights under the federal civil rights act. The officials, specifically the Committee on Selective Admission to Teacher Education, after a hearing before whom the student appeared, had decided not to allow the student to pursue any more courses leading to an education degree because he had been found guilty of possession of marijuana with intent to sell. The student sought an order requiring the college authorities to allow him to continue his education courses. A preliminary injunction was issued, permitting the student to take the courses pending further order of the court.

After the issuance of the preliminary injunction, the board of trustees for state colleges was allowed to intervene in the suit. The board moved to dismiss the suit because of the student's failure to exhaust his administrative remedies, particularly his failure to appeal to the board. The student contended that he was not required to exhaust administrative remedies under the provisions of the civil rights act and cited several cases to support this position.

The court said that the cases cited involved instances where it would have been futile as a practical matter to exhaust administrative remedies. In this instance the court believed that an adequate remedy existed at state law since the question of establishing the qualifications of who is eligible to become a teacher is a matter on which a board of professional educators would appear to be more qualified than the court. It also appeared to the court that "utilization of available administrative remedies of this Board might well dispose of this case short of the resolution of any federal constitutional question."

Consequently the motion of the school officials to dismiss the action was granted.

New York

George v. Fiore
308 N.Y.S.2d 744
Supreme Court of New York, Erie County,
March 18, 1970.

Parents of black male high-school students petitioned the court to compel the Board of Education of Lackawanna to hold a hearing to determine if their children were properly suspended, expelled, or dropped from the rolls of the high school. The students had voluntarily ceased attending school in early February 1970 after racial trouble at the school. Since all of the students were between 17 and 20 and, therefore, over the age of compulsory attendance, the school principal notified the parents that the students were being dropped from the school rolls because of their prolonged absence, on the assumption that they left school. The school had been willing at all times to accept the students if they returned to classes.

The court held that the students had not been suspended from school but rather dropped from the rolls. Since the students had not been suspended, but were properly dropped from the rolls, there was no right to a hearing. The court also noted that the students had nothing to fear at the school if they behaved themselves because police were on duty in the school to protect them if needed and that there had been no further incidents of racial disorder. The court granted an order permitting the students to attend classes and participate in all school functions if they should so elect, but otherwise dismissed the petition.

Serotte v. State Education Department
314 N.Y.S.2d 114
Supreme Court of New York, Special Term, Albany County
July 28, 1970.

The father of a handicapped child brought suit against the state education department and the Amherst school district, seeking to compel the state department to provide state aid for the boy's attendance at an out-of-state private school. The pupil had attended regular classes. During the third grade he was placed in a special public-school class. He had been diagnosed as a handicapped child because of cerebral dysfunction with hyperactivity and learning disabilities as well as emotional problems. He made satisfactory progress and was transferred to regular classes for fourth grade. The boy again experienced difficulties, and the father requested that the pupil be placed in special education classes. The request was denied because the school district claimed that the child was progressing in the regular classroom situation. The father then enrolled the child in the public schools of another district and later placed him in the out-of-state private school. State aid for the latter school was denied for the reason that a public-school program was available.

The court found that the child was a handicapped child within the meaning of the law. However, by the father's own admission the child had progressed satisfactorily when he attended the special public-school classes. The court therefore concluded that the father had not presented a clear legal right to the relief that he sought, and his complaint was dismissed.

Vaughn v. Board of Education of Union Free School District No. 2
314 N.Y.S.2d 266
Supreme Court of New York, Special Term,
Nassau County, Part I,
September 3, 1970.

Parents of school children sought a judgment requiring the board of education to permit their children to register and attend the public schools of the district. The parents were all recipients of public assistance, and all lived in an apartment complex originally built to house military personnel at a now closed air base. The residents of the complex were staying there on a month-to-month basis pending the ability of the county to secure different facilities for them. The school district refused to admit the children to school on the basis that they were not *legal* residents of the district.

The court held that the children were residents of the school district since their parents had no other residence and the children lived with them; and although this residence was not necessarily accompanied by an intention to remain permanently, the school district was obliged to enroll the children in its schools without charge. The court ordered the school district to accept the children for registration and attendance.

Oklahoma

Board of Education of Independent School District No. 20 v. Adams
465 P.2d 464
Supreme Court of Oklahoma,
February 10, 1970.

The school district sought a writ of prohibition against a lower court judge who had granted the requests of 18 children to transfer out of the district. Oklahoma law permits transfers to other school districts for certain specified reasons including topography, the health of the child, or that vocational subjects are not offered in the school district of the child's residence.

The judge had granted nine transfers based on reasons of health, all requests for which were accompanied by medical certificates. The school district attacked the sufficiency of the certificates, charging that they were not accompanied by evidence showing that the doctors were licensed to practice healing arts and that they did not set forth facts concerning the child's physical condition. The supreme court found that these contentions had no merit and upheld the transfers that were granted for medical reasons.

Six transfers were granted because of topography. The school district challenged these as not supported by sufficient evidence. Noting that courts may take judicial notice of facts of common knowledge, in this case location of cities and towns within the lower court's jurisdiction, the supreme court held that the judge properly recognized traveling about 11 miles farther to attend the assigned school would involve undue time and travel inimical to the best interests of the children involved. Therefore, these transfers were upheld.

Three more transfers were granted to permit the pupils to take vocational courses not offered in the district. However, the law that permits transfers for this reason also requires the consent of the receiving board. Since this permission was not obtained, the supreme court held that the judge exceeded his jurisdiction in ordering these transfers. The requested writ was issued against the judge only with regard to these transfers.

Board of Education of Independent School District No. 89, Oklahoma County v. York
429 F.2d 66
United States Court of Appeals, Tenth Circuit,
July 29, 1970.
Certiorari denied, 91 S.Ct. 968, March 8, 1971.

The district court entered a preliminary injunction requiring parents of a public-school pupil to send him to Harding school in the school district and no other. The parents violated this order and were cited for contempt. After a hearing the injunction was made permanent, and the parents were found guilty of contempt of court for violating the preliminary injunction. On appeal the parents challenged the validity of the injunction and their contempt sentences.

The school district was under a desegregation order that changed certain school attendance boundary lines. Prior to the boundary change the pupil had attended Taft school. After the boundary change he was assigned by virtue of his residence to the Harding school. The parents insisted that the boy attend Taft, and the board of education brought suit in federal court for a preliminary injunction to force the parents to send the pupil to Harding school. The mother continued to send the boy to Taft, escorting him there. The prosecution for contempt was then instituted.

The parents argued that the federal court did not have subject-matter jurisdiction over the case. The appellate court disagreed, noting the numerous cases holding that federal jurisdiction exists over school desegregation cases. The parents then argued that the boundary changes were purely local administrative orders over which the federal court had no jurisdiction. The appellate court disagreed with this argument also, stating that the school district had a federal right to be free from interference with its performance of its constitutional duties.

The court observed that the parents were making a collateral attack on the validity of the district court orders underlying this case. The court said that the court order approving the boundary change was valid and that the injunction was necessary and appropriate in aid of the court's jurisdiction over the district's desegregation problems. The court rejected the argument of the parents that the civil rights act prohibited the court from directing the boundary changes. It found nothing in this act that barred the boundary changes in this instance. The court was convinced that both the preliminary and permanent injunctions issued by the lower court were valid and should have been obeyed.

While the parents admitted that the pupil's mother had violated the injunction, they argued that the father had not. The father did not, however, claim that he did anything to comply with the injunction which imposed an affirmative burden on both parents to send their son to Harding school rather than Taft, if he continued in the public schools. Instead he stood by and apparently condoned his wife's violation. The court held that the failure of the father to comply with the court order was his own act, not that of his wife, and that the district court had properly held him in contempt.

The appellate court did feel, however, that the fines of $1,000 each assessed by the district court were harsh and excessive. These were reduced to $250 against the father and $500 against the mother. The injunctive orders and the contempt citations were affirmed, and the matter was remanded to the district court for imposition of the lower fines.

NOTE: The Supreme Court of the United States declined to hear an appeal in this case.

Independent School District No. 25 of Adair County v. Smith
463 P.2d 332
Supreme Court of Oklahoma, January 21, 1969.

The Stilwell school district challenged the validity of an order of the district court judge which granted transfers to 22 children from the Stilwell school district to the Peavine school district. All of the children had applied to the county superintendent for transfers and all had been denied. Their parents then appealed to the district court which granted all the transfers.

State law provides for transfers for certain statutory reasons. In the case of 11 children the transfers were allowed on the basis of topography. The evidence showed that five of the pupils lived closer to the Stilwell school, and that while the remainder lived somewhat closer to the Peavine school, bus transportation was provided by the former school. In view of this evidence, the higher court ruled that all of the transfers on the basis of topography should have been denied.

The district court judge had also allowed six children to transfer because of vocational subjects offered at the Peavine school. The only evidence presented was that the Peavine school offered remedial reading and Indian arts and crafts. The higher court held that these were not vocational subjects under the statute providing for transfers. The remaining children were allowed to transfer because of medical reasons, illness of one parent, and tender age. These grounds for transfer, the court said, were not enumerated in the statute. One ground for transfer in the statute was the health of the child, but a medical certificate was necessary. Since no health certificate was produced, the court ruled that no medical grounds for transfer be considered.

The order of the district court granting the transfers was vacated.

South Carolina

Williams v. McNair
316 F.Supp. 134
United States District Court, D. South Carolina,
Rock Hill Division, August 24, 1970. Decision affirmed,
91 S.Ct. 976, Supreme Court of the United States,
March 8, 1971.

Male students sought to enjoin the enforcement of a South Carolina statute which limited regular admissions to state-supported Winthrop College to women. They asserted that except for their sex they fully met all admission requirements of the college.

The facts showed that South Carolina has eight separate state higher education institutions and nine additional regional campuses. All but two of these institutions are coeducational. The exceptions are the Citadel, an all-male military institution, and Winthrop College which was designed as a school for young ladies which, though offering a liberal arts program, gave special attention to courses thought to be specially helpful to female students.

The court noted at the outset that the equal protection clause of the Fourteenth Amendment does not require equal treatment for all citizens and does not preclude statutory classifications where they are not arbitrary and wanting in rational justification. Further, legislative classifications based on sex have been held constitutionally permissible. Thus the issue in this case was whether the sex classification created by the statute for admission to Winthrop College was without rational justification.

It was conceded that educational authorities are divided on the issue of one-sex schools, and that there is a present trend away from this type of education. However, in view of the respectable body of opinion that one-sex schools can advance the quality and effectiveness of instruction, the court could not find the statutory classification wholly wanting in reason. If the state operated only one institution, the court said, there would be no question but that denying admission to males would be constitutionally impermissible. But since there are a number of coeducational state institutions that the plaintiffs would be eligible to attend, the court would not order that they be allowed to attend Winthrop College. The court pointed out that the students did not allege that there was any special feature of Winthrop that would make it more educationally advantageous for them to attend than any other state institution. Nor did the court find their argument that they were deprived of their right to attend a state college in their home town to be sufficient. The court held that they were not being treated any differently than were students who lived remote from a state supported institution.

The court concluded that the statutory classification could not be declared to be without any rational justificaiton and violative of the equal protection clause of the Fourteenth Amendment. The relief requested by the male students was denied.

NOTE: On appeal the decision was affirmed by the Supreme Court of the United States.

Tennessee

Hobson v. Bailey
309 F.Supp. 1393
United States District Court, W.D. Tennessee, W.D.,
February 20, 1970.

A black high-school student sought an injunction enjoining Memphis City school officials from preventing her return to Northside high school. The girl was a senior student with good grades and no previous history of disciplinary problems. She was initially placed on a three-day "home suspension" for missing classes during a city-wide black student boycott of public schools and for picketing the school and allegedly encouraging other students to also boycott classes. During the three-day suspension she appeared at the school with her mother as directed. At that time both were informed that the girl had been placed on "board suspension" and should report to the assistant superintendent. They proceeded to the office of the school board and at the meeting with the coordinator of pupil services, who had only a carbon copy of the suspension order, the charges were read to the student and she was informed that she would not be allowed to return to school. The court found no evidence that during this meeting the girl and her mother were told that they were entitled to a hearing or that the student could attend other schools in the system.

Following her exclusion from school the student engaged in vigorous civil rights activity including a radio broadcast critical of the way her effective expulsion was handled. Subsequently she was arrested on a disorderly conduct charge for participation in a protest at one school. At a meeting with the juvenile court probation officer on this charge, the girl was told that her case could be disposed of nonjudicially, and she would be able to return promptly to school. This involved her signing a form admitting that she was guilty of the offense of disorderly conduct. This admission of guilt was later used by the school board as an additional reason for not readmitting the girl to school.

Almost one month after the original suspension the student was informed that she would be allowed to attend Memphis Technical School in another month. This the girl elected to do, and at the time this case was heard she was progressing satisfactorily. A hearing had been held before the board on the transfer to the second school at the request of the student and her mother, but the decision of the Attendance Department was upheld and the girl was not allowed to return to Northside school. The grounds for the transfer appeared to be that the school officials thought the girl to be one of the ringleaders of the black boycott and the resulting disturbances at some schools.

The student contended that her activity was a proper exercise of her First Amendment rights of speech and protest, that the suspension was a violation of Fourteenth Amendment due process rights. She further contended that the suspension and subsequent transfer were so tainted by lack of due process that an injunction should be issued ordering the school officials to reassign her to the Northside high school.

As to the claim of violation of First Amendment rights, the court stated that student rights under this amendment are not unlimited but must be exercised without material or substantial interference with the requirements of appropriate discipline in the operation of the schools. The court found that the girl's repeated absences from school and interference with the education process warranted her suspension for the original three-day period. The court also found that the action of the school principal in placing the girl on board suspension for her activities during the three-day suspension period was justified in the circumstances but that the discipline should have been given in an appropriate manner. The court was of the opinion that the procedure followed in disposition of the board suspension did not meet the minimum standards of due process. The court noted that the record reflected no established procedures to be followed by school officials in ruling on appropriate discipline in the circumstances. Insufficient information was furnished the officials who issued the indefinite suspension. The suspension notice described the conduct as "inciting students not to enter the building; however, there was no evidence that the girl did anything more than picket the school. Although the charges were read to the girl, there was no indication that their nature was explained to her. The previous record and attitude of the girl were not taken into consideration.

The court also held that the conduct of the girl from the time of her suspension until her readmission to the second school must be judged in a different light than if she were subject to discipline by the school authorities since she was no longer a student in the school system. She signed the admission of guilt form only with the understanding that she would then be promptly readmitted to school.

The court concluded that even though the school authorities were justified in disciplining the girl for her conduct, "this discipline should have been dispensed at all stages in accordance with due process of law guaranteed by the Fourteenth Amendment of the United States Constitution." It was the opinion of the court that the student be returned to the Northside school with the understanding that if she subsequently participates in conduct which authorizes disciplinary action, officials may undertake proper punishment by proper actions.

Texas

Allen v. Chacon
449 S.W.2d 289
Court of Civil Appeals of Texas, Dallas,
December 12, 1969; rehearing denied January 16, 1970.

The school district appealed from a preliminary injunction restraining it from continuing to refuse admission to a 12-year-old pupil. The pupil was suspended in January 1968 after it was alleged that he and another pupil broke into the school and set fire to the building causing $3,800 damage. School district regulations provided that the parents of school children who destroyed school property would be required to pay for the damage before the pupil was readmitted to school. The parents maintained that they were financially unable to make restitution. The boy had been out of school for over one year at the time suit was instituted.

The family of the pupil consisted of the parents and three school-age children. The sole income of the family was $99 earned by the father every two weeks. In this instance, the board reduced the amount of liability to $300, to be paid in $25 bi-weekly installments. The parents agreed to this plan but never made the first installment. Under the board policy, the boy would have been admitted when the first payment was made, no matter how small and he would be allowed to remain in school even if his parents did not keep up the payments.

Since it was the policy of the school board to take into consideration the financial condition of the parents in requiring payment for vandalism, the appellate court held that the trial court did not abuse its discretion in granting the pupil a temporary injunction.

Virginia

Kirstein v. Rector and Visitors of the University of Virginia
309 F.Supp. 184
United States District Court, E.D. Virginia, Richmond Division, February 9, 1970.

Four women brought suit to compel their admission to the University of Virginia, previously an all-male institution. At a preliminary hearing of the case the court expressed reluctance to interfere with the internal operations of the university and urged that the parties agree upon a consent judgment. Subsequently the University Board of Visitors adopted a plan calling for women to be admitted in specific numbers in 1970 and 1971 and thereafter to be admitted on an equal basis with men.

The four prospective women students objected to this plan because there was no assurance that the university would not later revert to being an all-male institution and because the plan did not solve the question of sex discrimination at other Virginia higher educational institutions.

The court took into account that the University of Virginia was by far the largest of the state operated schools, offering the widest range of programs, and that it had a certain "prestige factor" not present in other state institutions of higher education. The court held that on the facts of this case, the particular women plaintiffs had been denied their constitutional right to an education equal to that offered men at the University of Virginia and that such discrimination on the basis of sex violates the equal protection clause of the Fourteenth Amendment. The court declined to go so far as to hold that the state may not operate any educational institution separated according to the sexes.

The court did not issue the requested injunction because it believed that the plan for the admission of women at the University of Virginia would be put into effect. Since female students were now accepted at the university, the case was ruled moot and the suit was dismissed.

SCHOOL DESEGREGATION

Case Digests

As mentioned in the introduction, many of the school desegregation cases published this year are reported only by name and citation. Following are the digests of 47 of the 119 cases appearing this year. Beginning on page 39 are the names and citations of the remaining decisions.

Alabama

Davis v. Board of School Commissioners of Mobile County
430 F.2d 883
United States Court of Appeals, Fifth Circuit,
June 8, 1970.

(See *Pupil's Day in Court: Review of 1969*, p. 14; *Review of 1968*, p. 24; *Review of 1966*, p. 14.)

Black pupils appealed from a decision of the district court approving a desegregation plan. The appellate court considered the plan with respect to the six elements that make up a unitary school system and concluded that the transportation system, extracurricular activities, and facilities were nondiscriminatory and in compliance with constitutional requirements. The faculty and staff, however, did not approach the mandates of *Singleton* with respect to racial ratios although the district court had directed the school board to do so on August 1, 1969. The district court was directed to require strict compliance with *Singleton* as to faculty and staff ratios and to include as part of its order the requirements of *Singleton* with respect to transportation, school construction, and school site selection.

The appellate court also found inadequate pupil desegregation insofar as 60 percent of the black pupils were attending segregated schools. The Department of Justice had submitted a desegregation plan which would have reduced this figure to 28 percent and reduced the number of segregated elementary schools from 12 to nine and from seven black junior and senior high schools to one senior high school. The appellate court ordered this plan to be invoked after modifying it to eliminate the segregated high school and one of the segregated elementary schools. All of the remaining segregated schools were concentrated in an area east of an interstate highway which bisects the city of Mobile. The appellate court held that these remaining segregated schools were a product of neighborhood patterns and ordered a majority to minority transfer provision to alleviate the situation for those pupils who wished to transfer. Transferring pupils were to be provided transportation if they wished it and were to be given priority for space. All changes were to be completed by July 1, 1970.

Davis v. Board of School Commissioners of Mobile County
430 F.2d 889
United States Court of Appeals, Fifth Circuit,
August 28, 1970.

Certiorari granted, 91 S.Ct. 11, October 6, 1970.

(See case immediately above.)

Following remand in the case above, the district court made changes in the attendance zones of 32 schools. Those that were made on the basis of efficient school administration or those to which no claim of racially discriminatory purpose was made were affirmed by the appellate court. However, those changes that were not made on these bases and which diminished desegregation were not affirmed. In addition, the district court order was modified to provide that pupils who refused to attend the schools to which they were assigned under order of the district court would not be permitted to participate in school activities or take examinations and receive grades or credit for courses.

NOTE: On April 20, 1971, the Supreme Court of the United States reversed the decisions in the two cases above insofar as they treated the areas east and west of the interstate highway as separate zones and held that inadequate consideration was given to the possible use of bus transportation and split zoning. The case was remanded to the Fifth Circuit Court of Appeals for "the development of a decree 'that promises realistically to work, and promises realistically to work *now*.'" (91 S.Ct. 1289)

Lee v. Macon County Board of Education
317 F.Supp. 103
United States District Court, M.D. Alabama, E.D.,
August 14, 1970.

Black pupils and the United States as a plaintiff-intervenor brought suit seeking the desegregation of Alabama junior colleges and trade schools. The state board of education was directed to file plans for the desegregation of these schools. The court found the plans deficient and directed the U. S. Department of Health, Education, and Welfare to formulate and to submit a desegregation plan to the court. That plan and the proposed alternate plan of the state board of education was before the court in the instant proceeding.

The state operates 27 trade schools and 17 junior colleges throughout the state. Only a few have any dormitories. The institutions are primarily commuter colleges with free transportation provided in some instances. Two of the junior colleges and six of the trade schools were designed as black institutions and by both student body and faculty were identifiable as such. Both of the black junior colleges were located near similar institutions for white students and five of the six black trade schools were located in cities having trade schools for white students. The sixth black trade school was located about 35 miles from a predominantly white trade school. Trade schools and junior colleges were assigned attendance areas which in the case of the trade schools were duplicated for the white and black facilities.

The court directed that for the 1971-72 school year the attendance area for one of the black junior colleges and one white junior college be drawn so that all students living within the area would attend the school serving their area and that the facilities and curriculum at the former black school be expanded so that it was comparable to that offered at the former white school. Since the state board of education does not control the expenditure of funds for capital outlay for junior colleges, the court directed the United States to file the appropriate pleadings to bring the Alabama Junior College and Trade School Authority in as a defendant in this action.

With regard to the trade schools the court ordered that duplication of programs and curricula offered in the two trade schools in each of five cities be eliminated within 90 days. With regard to the black trade school located 35 miles from the white trade school, the court ordered that separate attendance zones be drawn for the two schools and that no student residing in one zone be allowed to attend any other school unless for the purpose of taking a course or subject not offered by the trade school in his zone of residence.

The court also directed that certain schools located near each other immediately exchange faculty members through the use of temporary assignments until a desegregated faculty is attained in each institution. Further, by September 1971 a minimum of 25 percent of the faculty and staff at each institution is to be black. The court also ordered that any recruiting team sent to Alabama high schools to recruit students to the junior colleges and trade schools be composed of members of both races and that special efforts be made to recruit students of a race different from that which the institution was originally designed to serve. Within 60 days from the court order and again in September 1971 the state board of education was directed to report to the court the racial composition of the faculty, staff, and student body of each of the schools, the transportation and attendance areas, and the curriculum offered in each school. The court retained jurisdiction of the case.

Singleton v. Jackson Municipal Separate School District
419 F.2d 1211
United States Court of Appeals, Fifth Circuit,
December 1, 1969.

Singleton v. Jackson Municipal Separate School District
Carter v. West Feliciana Parish School Board
90 S.Ct. 608
United States Supreme Court,
January 14, 1970.
(See page 27.)

State of Alabama v. United States
314 F.Supp. 1319
United States District Court, S.D., Alabama, S.D.,
June 26, 1970. Appeal dismissed, 91 S.Ct. 355,
December 14, 1970.

The state of Alabama sought a declaratory judgment that a special act of the 1970 Legislature was constitutional. The defendants in this action were various officials of the United States government and the pupil-plaintiffs in a school desegregation case, *Davis v. Board of School Commissioners of Mobile County* (see page 16 of this report). A desegregation order had been issued by the district court in the *Davis* case prior to the passage of the special act. Following the enactment, the local school board instructed the superintendent and the staff to take no further steps in implementing the desegregation plan. The pupil-plaintiffs then sought a declaration that the act was unconstitutional. The court denied the motion but required the school board to follow the desegregation plan in accord with its prior order, and "if the same is not followed within three days from this date, a fine of $1,000 per day is hereby assessed for each such day, against each member of the Board of School Commissioners."

The state of Alabama then instituted this suit. A three-judge federal court was constituted to determine if there was a substantial constitutional question presented to warrant the need for the court. The court found that the section of the act in question barring any school district zone line or attendance unit being altered to achieve racial balance, purports to make superintendents and school administrators neutral on the question of desegregation and limits their tools to accomplish this constitutional obligation to freedom-of-choice plans. The court held that school desegregation decisions by both the Supreme Court of the United States and the Court of Appeals for the Fifth Circuit make it clear that more than neutrality is required of school administrators."

The court held that the "settled state of the law convinces us that there is no substantial federal question presented in this case. Where Section 2 of the subject Act conflicts with an order of a federal court drawing its authority from the Fourteenth Amendment, the Act is unconstitutional and must fail." The court was of the opinion that there was no need for a three-judge court in this instance and the case was remanded for action by a single district judge.

NOTE: The Supreme Court of the United States dismissed the appeal in this case for want of jurisdiction.

Arkansas

Burleson v. County Board of Election Commissioners of Jefferson County
308 F.Supp. 352
United States District Court, E.D. Arkansas, Pine Bluff Division, January 22, 1970.

(See *Pupil's Day in Court: Review of 1969, Cato v. Parham*, p. 15-16.)

The Dollarway School District had been involved in protracted desegregation litigation. A portion of this district, known as the Hardin Area, was almost exclusively white and geographically isolated from the rest of the district. This case arose when the Area sought to secede from the remainder of the district. A petition was circulated calling for an election. White parents of both the Area and the district sought to enjoin the election, but the court declined to do so and the secession measure carried. The parents then sought to enjoin operation of the new district, contending that the decrees of the court in the Dollarway case would be frustrated by the secession and would deprive their children of their right to attend racially integrated schools. Proponents of the secession argued that integration was not of issue and was not the reason for the secession.

The Dollarway District including the Hardin Area had 55 percent black pupils and 45 percent white pupils. The court found that the racial imbalance in the district would be increased substantially, if the Area's 270 pupils, of which all but five were white, were withdrawn from the district. The court also found that secession of the Area would inflict severe financial damage on the district. Taking these two points together, the court said it was fairly inferable that there would be some exodus of white pupils from the district schools and it was possible that the entire system would become a black system with only a token number of white pupils in attendance. Accordingly, the secession of the Hardin Area from the Dollarway District was enjoined. However, the court did not rule that secession would never be possible, but rather that it could not be accomplished while the litigation regarding integration of the system was going on.

Haney v. County Board of Education of Sevier County
429 F.2d 364
United States Court of Appeals, Eighth Circuit,
June 29, 1970.

(See *Pupil's Day in Court: Review of 1969*, p. 19; *Review of 1968*, p. 28.)

In prior proceedings, two separate school districts, one all-black, the other all-white, were ordered by the appellate court to consolidate, and the county board of education was directed to present a workable plan to effectuate a unitary school system. On remand of the case, the district court, after hearings, approved a desegregation plan and the black pupil-plaintiffs appealed.

Plaintiffs contended that the district court, in complying with the appellate court mandate "to effectuate a completely nonracial school system in Sevier County," erred in assuming that its annexation order was bound by Arkansas law. The appellate court agreed, saying that the power of federal courts to remedy school segregation is not limited by state law. Consequently, state law in no way limited the equity power of the district court to fashion a decree that effectuated a unitary school system. But the appellate court did not find any error in ordering the larger Lockesburg (white) school district to annex the black Sevier district if the annexation did in fact accomplish a unitary school system. However, the higher court held it was error for the district court to direct that the new enlarged school board of the consolidated district be composed of all five white members from Lockesburg and only three of the five black members of the Sevier board and to provide that the terms of the black members expire at the next election while holding that the terms of the white members be set by a two-thirds vote of the board, possibly as long as four years. The appellate court held that this constituted a violation of the equal protection clause of the Fourteenth Amendment, and directed the district court to order a popular election of the entire school board.

The plaintiffs also charged that the portion of the lower court order directing that the salaries of all teachers in both districts be paid until the end of their contract term, but that the services of only five of the black teachers from Sevier be utilized in instructional positions was unconstitutional. The appellate court noted that it was the district court and not the school board that made the decision as to which teachers would receive assignments and that there was nothing in the record to explain its rationale. The appellate court concluded that the district court was in error in making this determination as it was a board matter. The appellate court made it clear that it was not saying that the school board had to retain all teachers in the system, but that it was required to formulate some objective nondiscriminatory standard for the evaluation and retention of the teachers necessary to the operation of the system, and that the black teachers who did not receive assignments for the 1969-70 school year were not to be penalized when decisions were made on retention of faculty for the next year.

The pupil-plaintiffs argued further that the part of the order of the lower court which required use of the Lockesburg school facilities, but only permitted use of the Sevier facilities if the former proved inadequate, placed the burden of integration on the black children. It was the belief of the appellate court that there was a heavy burden on the school board and on the district court to "explain the closing of facilities formerly used for the instruction of black students." The higher court noted that at least the elementary school in Sevier was rated A.

Finally, the appellate court held that the district court should have retained jurisdiction of the case. The judgment of that court was vacated in part, and the case was remanded for further proceedings consistent with this opinion.

Jackson v. Marvell School District
425 F.2d 211
United States Court of Appeals, Eighth Circuit,
April 29, 1970.

(See *Pupil's Day in Court: Review of 1968*, p. 19; *Review of 1969*, p. 28.)

Following remand from the circuit court of appeals the school district proposed a desegregation plan that would have achieved a unitary system in January 1970. Counsel for the pupil-plaintiffs informed counsel for the school district that the plan was suitable and that they had no objections, and therefore, there was no need for a hearing. In the meantime, the school superintendent sent letters to all of the parents in the district, informing them of the restructure of the schools and that as far as possible their children would stay with the same teachers for the semester following integration. The district court then approved the desegregation plan with the exception of that portion which proposed to desegregate the faculty.

The pupils then brought this appeal, challenging the propriety of the lower court's failure to require the school district to desegregate not only the school faculties but also the classes. The appellate court reversed the district court, saying that it was error for that court to sanction "the district's ingenious effort to circumvent the plain meaning of our decision. It is settled doctrine that segregation of the races in classrooms constitutes invidious discrimination in violation of the Fourteenth Amendment to the Constitution."

Because of the short time remaining prior to the end of the school year, no interference with the assignment of pupils was ordered. However, the district court was directed to enter an order requiring the school district to fully and effectively desegregate not only all facilities but also faculty and classes by the beginning of the 1970-71 school year.

California

Brice v. Landis
314 F.Supp. 974
United States District Court, N.D. California,
August 8, 1969.

Parents of school children in the Pittsburg Unified School District sought to enjoin the school district from failing to adopt a comprehensive plan for desegregation of all the schools in the district. The district's plan involved the closing of the Martin Luther King School, a black elementary school, and the bussing of the children attending that school to three other elementary schools in white neighborhoods. The district then intended to sell or lease the closed school to another county. A preliminary injunction was issued to prevent disposal of the King school. Before the court in the present proceedings was the parents' motion to extend the injunction and the school board's motion to dismiss the action.

The gist of the parents' complaint was that the board's plan will place the entire burden of integration on the black children and their parents while children in the white neighborhoods will avoid the necessity for transfer and bussing to other schools. The parents alleged that this particular plan was adopted because white parents were opposed to having their children bussed to predominantly black neighborhoods.

The school officials maintained that the primary reason for the decision to close the King school was economic because the low per-grade enrollment at the school resulted in higher costs. The court said, however, that a more reasonable inference from the record was that the higher cost was caused by the more intensive instruction given an all-minority student body rather than the low per-grade enrollment.

According to the court, the issue presented was whether the plan of the district represented a good faith effort to integrate the schools. Although the plan itself would integrate the schools, the court said, if the means used involved substantial elements of racial discrimination, the plan would be suspect concerning whether it was indeed a good faith effort. The court did not say that the black pupils could not be bussed to other schools when the circumstances required. However, where the closing of an apparently suitable black school and the transfer of its pupils back and forth to white schools without similar arrangements for white pupils is not absolutely or reasonably necessary, then the court must consider the obvious fact that the burden of desegregation is placed entirely upon the black pupils. The court found the economic reason offered by the district for closing the King school to be unconvincing. In view of other alternatives available to the district, the court was more convinced by the parents' contention that the closing of the black school and the one-way bussing of black children only, was not a good faith effort to desegregate the schools.

The court concluded that the record justified continuing in effect the preliminary restraining order against disposition of the King school pending trial on the merits of the case, or until the district sooner considered and was prepared to effectuate an alternate plan or some modification of the present plan that "will more fairly and adequately implement the constitutional principles involved."

Spangler v. Pasadena City Board of Education
311 F.Supp. 501
United States District Court, C.D. California,
January 22, 1970. Supplemental findings of fact and conclusions of law, March 12, 1970.

In this school desegregation suit, the district court made findings of fact that there was racial imbalance in the student bodies and faculties in the Pasadena school district at all levels. Some of this racial imbalance resulted from the racially identifiable neighborhoods, and the school district's strict adherence to neighborhood schools. Other factors resulting in racially imbalanced schools were actions of the school board in drawing attendance zones and location of new schools which tended to perpetuate segregation in the Pasadena schools. The court also found that the need for integration was recognized by some administration officers and some members of the school board; however, the district took little, if any, effective action to integrate the schools. Suggestions made by various citizens' committees to further integration were rejected or ignored by the board of education. Further, the school board was fully aware that it could take race into consideration in drawing attendance zones but preferred to rely on conflicting advice from county counsel. And while school district transportation was utilized to permit black pupils to attend predominantly white schools, it was also used to transport white children away from predominantly minority schools, but not to transport children from majority white residential areas to majority black schools to increase integration.

The court found discrimination in the hiring, promotion, and assignment of minority faculty members and administrators. It was also found that the school board had constructed new schools and built additions to existing schools in a manner that contributed to the racial identifiability of schools in the district. In addition, in integrated schools as well as in identifiable schools the district used grouping of pupils by ability level. This practice increased segregation within the schools. Some testimony from school district officials was to the effect that the grouping was made on the basis of intelligence tests which in themselves are racially discriminatory. In other findings, the district officials were shown to have granted transfers from one school to another when they knew or should have known that the requests were wholly or partly motivated by racial considerations. The open transfer policy adopted by the school district did little to alleviate segregation since the white receiving schools were located on the outskirts of the district and a transferring pupil had to provide his own transportation.

In its conclusions of law the court held that under the facts of this case the use of a strict neighborhood school policy and a policy against cross-town bussing took on constitutional significance as a violation of the Fourteenth Amendment. Under this amendment, a public school body has an obligation to act affirmatively to promote integration, consistent with the principles of educational soundness and administrative feasibility. A violation of the Fourteenth Amendment has occurred when public-school officials have made a series of educational policy decisions which are based wholly or partly on considerations of the race of the pupils or of the teachers and which have contributed to increasing racial segregation in the public schools.

Concluding that the Pasadena school board had violated the Fourteenth Amendment by its educational practices and had denied to black and other minority children the equal protection of the law, the court enjoined the school officials from discriminating on the basis of race in the operation of the school district, and directed them to prepare a plan to correct the racial imbalance at all levels. This plan was to be submitted to the court by February 16, 1970. The plan was to include programs for the assignment, hiring, and promotion of teachers and other professional staff members in such a manner as to reduce racial segregation throughout the district. The plan was to include procedures to be followed and goals to be attained in connection with the location and construction of facilities, both permanent and temporary, with a view to decreasing segregation. The plan was also to provide for pupil assignments so that by September 1970 no school in the district would have a majority of minority pupils. The court retained jurisdiction of the case to observe and evaluate the plans and their implementation.

Colorado
Keyes v. School District No. 1, Denver, Colorado
313 F.Supp. 61
United States District Court, D. Colorado,
March 21, 1970.

(See *Pupil's Day in Court: Review of 1969*, p. 20-21.)

The district court had entered a preliminary injunction in 1969, requiring the Denver board of education to implement three resolutions of the board that had been rescinded. These resolutions would have increased integration in the Park Hill area of the city. In this suit the black and Hispano plaintiffs sought additional relief from allegedly segregated schools.

The pupils' first claim for relief concerned the three resolutions. The court affirmed its previous holding regarding the Park Hill schools—that the actions of the board by site locations and boundary changes "tended to isolate and concentrate black students in those schools which had become segregated in the wake of black population influx into Park Hill while maintaining for as long as possible the Anglo status of those Park Hill schools which still remained predominantly white." The court had concluded in the previous hearing that the three resolutions in question would have relieved this isolation and that the rescission of the resolutions was a legislative act amounting to *de jure* segregation. Since the preliminary injunction had not included two schools that were covered by the resolution, the court extended the injunction to cover them also.

The first count of the pupils' second claim for relief alleged that *de jure* segregation existed at certain schools in the core city. The court held that although these schools were racially imbalanced, the actions of the school board in making boundary changes and removing optional zones were not such as to establish *de jure* segregation. The court found lacking the intent to segregate which distinguishes *de jure* from *de facto* segregation. The present state of the law, particularly in the Tenth Circuit, the court said, did not dictate that affirmative relief must be granted from this type of segregation. The pupils further claimed that the neighborhood school policy in and of itself was unconstitutional when it created or maintained segregation and should be so ruled by the court. This the court declined to do, saying that the pupils were not entitled to relief merely on proof that there was *de facto* segregation in certain schools.

Another count in the pupils' second claim for relief alleged that certain schools provided an unequal educational opportunity for the pupils attending them; that they were segregated schools; and, therefore, these pupils were being denied equal protection of the laws. To establish the inferiority of these schools, the plaintiffs introduced evidence to show the below-average scholastic achievement of the pupils in these schools, less experienced teachers in these schools than in predominantly Anglo schools, higher rates of teacher turnover owing to a policy which gives to teachers with more seniority preference as to transfers, higher pupil dropout rate than the city average, and buildings that were generally older and had smaller sites. In addition to this evidence, the major argument of the pupils was that the segregation which existed at many of these schools made a major contribution to this inferiority. The court found that the evidence established beyond a doubt that an equal educational opportunity was not being provided at these segregated schools; that many factors contributed to their inferior status, the predominant one being the enforced isolation imposed in the name of neighborhood schools and housing patterns. Under the present state of the law, the court said, even though *de facto* segregated educational facilities may be maintained, they must be equal.

The preliminary injunction requiring the implementation of resolutions of the board was made final. The court suggested that the board take various steps to equalize the educational opportunities at the segregated schools, possibly by prohibiting voluntary transfers of teachers and by upgrading the remedial programs offered. The court also suggested that a voluntary transfer program be instituted for children in inferior schools so that they could transfer to other schools, with the board required to furnish transportation and space. The court said that final judgment would not be effective until the 1970-71 school year, but the preliminary injunction would be in effect until that time.

Keyes v. School District No. 1, Denver, Colorado
313 F.Supp. 90
United States District Court, D. Colorado,
May 21, 1970.

(See case immediately above.)

Pursuant to the decision in the case above and by court request both the Negro and Hispano pupils and the school board presented plans to remedy the inequality of educational opportunity found to exist. The plans of the plaintiffs called for pairing and cross-bussing as the first phase, and programs to promote cultural understanding and for compensatory education as other phases. The school-board plan was basically one of compensatory education with little emphasis on desegregation. The board also proposed a number of innovative programs.

Finding that the overwhelming weight of the evidence showed that the racial isolation of the black and Hispano children which existed in 17 designated schools was the primary factor producing inequality of educational opportunity at those schools, the court concluded that this inequality could be remedied only by combined programs of desegregation and massive compensatory education. The court further found that neither the plans of the pupils nor the plans of the board were wholly satisfactory, and therefore the court fashioned its own plan.

The court plan called for the desegregation of the designated elementary schools to be accomplished over a two-year period beginning in part on or before September 1971, and to be completed by September 1, 1972. Two junior high schools and one senior high school were also directed to be desegregated within this time. The court said that it would consider complete desegregation fulfilling the constitutional requirement to be accomplished when each of the designated schools had an Anglo composition in excess of 50 percent. The court also said that although not constitutionally required, it would be desirable to have the minority population distributed equally between black and Hispano pupils. The details of the redistricting and transportation were left to the school board and the plaintiffs. However, the court was reluctant to order mandatory bussing and said that it should be avoided to the extent possible. With regard to one of the junior high schools, the board was given the option of desegregating the school or of using it for special education or other special programs. The court said that a basic assumption was that whichever alternative was chosen, the school would be integrated. Between the time of the issuance of this decree and the beginning of the September 1971 term and continuing thereafter, the court directed that an extensive program of education be carried out within the community and the school system in preparation for desegregation and integration, including orientation programs for teachers in the field of minority cultures and problems.

The board's plans for compensatory education were approved. The court directed that at a minimum these programs should include integration of faculty and staff, encouragement and incentive to place experienced teachers in the core city schools, use of aides and paraprofessionals, human relations training for all school employees, inservice training, extended school year, programs under a state statute for remedial reading, federal early childhood programs, classes in black and Hispano culture and history, and Spanish language training. All of these programs and others included in the school board plan were to be initiated by the 1970-71 school year.

Florida

Ellis v. Board of Public Instruction of Orange County, Florida
423 F.2d 203
United States Court of Appeals, Fifth Circuit,
February 17, 1970.

The issue presented in this appeal was whether Orange County was operating as a unitary school system. The appellate court held that in five of the six criteria by which unitary school systems are judged, Orange County was a unitary system. The transportation system, activities, and facilities were integrated, and the school district had established a faculty and staff racial ratio in each school. Additionally, the district had agreed to comply in full with the *Singleton* provisions regarding nondiscriminatory practices in maintaining and replacing faculty and staff.

The only question left was the student body composition. Orange County had been required to implement a majority to minority transfer provision and had exceeded the *Singleton* directive by furnishing free transportation to transferring pupils, notifying all parents of the provision, and giving priority of space to transferring pupils. Other than the transfer provision, pupils were assigned to schools on a neighborhood basis. This assignment system left 10 elementary schools and one junior high school with all-black student bodies. These schools housed 51 percent of the black pupils in the system.

The appellate court found from evidence submitted by the district court that variances from a strict neighborhood assignment were allowed with the result that some white pupils attended schools greater distances from their homes than nearby schools where the student body was all-black. If these variances were not permitted, eight of the 11 schools having all-black student bodies would be integrated and the percentage of black pupils attending integrated schools would rise from 49 percent to 84 percent.

The appellate court ruled that Orange County could continue to use a neighborhood school assignment system but that it must be altered from the present assignment method. Children must be assigned to the school nearest their residence subject only to the capacity of the school and then to the next nearest school. Variances would not be permitted by arbitrary zone lines or for reasons of traffic, for such variances might destroy the integrity and stability of the entire neighborhood assignment plan.

The case was remanded to the district court with directions that it retain jurisdiction for a reasonable time to insure that the school system was being operated in a constitutional manner.

Singleton v. Jackson Municipal Separate School District
419 F.2d 1211
United States Court of Appeals, Fifth Circuit,
December 1, 1969.

Singleton v. Jackson Municipal Separate School District
Carter v. West Feliciana Parish School Board
90 S.Ct. 608
United States Supreme Court, January 14, 1970.
(See page 27.)

Georgia

Barresi v. Browne
175 S.E.2d 649
Supreme Court of Georgia, June 15, 1970.
Certiorari granted, 91 S.Ct. 10, November 6, 1970.

Parents of white and black school children in Clarke County, Georgia, sought a preliminary injunction to bar implementation of the pupil assignment plan for elementary-school children for the 1969-70 school year. The trial court denied the injunction. It also held that the school board could not serve free breakfasts under a federal program in some elementary schools unless it served them in all elementary schools. The parents appealed from the denial of the injunction, and the school board cross-appealed from the order restraining the serving of free breakfasts.

The evidence indicated that in 1968 the U. S. Department of Health, Education, and Welfare notified the Clarke County school board that a new school desegregation plan would be required for the 1969-70 school year. In June 1969, HEW rejected the plan submitted by the school board. In July 1969, the board formulated a plan to desegregate the elementary schools so that all but two schools would have a 20-percent minimum and 40-percent maximum black enrollment and the remaining two schools would have approximately equal enrollments of black and white pupils. Since this could not be achieved solely by geographic zoning, the board assigned five "pockets" of black children residing in four zones to schools outside their zones and bussed those who resided more than one mile and a one-half from their newly assigned schools. To make room for the black children transferring into these schools, some white children had to be bussed out of these schools to other schools.

The parents charged on appeal that this school assignment plan was unconstitutional under the equal protection clause of the Fourteenth Amendment. The state court noted the decisions of the Supreme Court of the United States in the area of school desegregation, holding that maintenance of a dual school system is unconstitutional and that segregation by race in public schools by any form of compulsion is unconstitutional. However, in the view of the Georgia court, "the United States Supreme Court has not declared that compulsory integration of the races in public school systems is demanded." The state court found that the white and black school children in whose behalf this suit was brought, unlike others similarly situated in Clarke County, were effectively being excluded from some schools because of race or color. This, the state court said, was in violation of the Supreme Court holding in the *Alexander v. Holmes County Board of Education* (90 S.Ct. 29 (1969)). The state court concluded that the Clarke County board of education had attempted to achieve a predetermined racial balance in the elementary schools by treating pupils differently solely because of their race. Therefore, the lower state court was in error in not enjoining the assignment plan for the elementary schools for the 1969-70 school year.

With respect to the issue of the free breakfast program, the appellate court noted that this program was authorized by the Child Nutrition Act, a federal statute. The evidence showed that the board of education was operating the breakfast program in conformity with the federal statute. In view of this, the appellate court held that the trial court erred in enjoining the school board from serving breakfast in any elementary school unless similar breakfasts were served or offered to be served at all the elementary schools.

NOTE: This decision was reversed by the Supreme Court of the United States on April 20, 1970. The Court said that in the process of remedying segregation, "steps will almost invariabley require that students be assigned 'differently because of their race.'" *McDaniel v. Barresi*, 91 S.Ct. 1287)

Reeves v. Hancock County Board of Education
430 F.2d 1334
United States Court of Appeals, Fifth Circuit,
August 17, 1970.

Black pupils appealed from the dismissal of their school desegregation suit by the District Court for the Middle District of Georgia. The court dismissed the case because "the matter of desegregation of the public schools of Hancock County, Georgia is now having the attention of the United States District Court for the Northern District of Georgia and . . . it would be unseemly . . . for this court to assume jurisdiction in the premises."

At the time of dismissal of this case, there was pending in the U. S. District Court for the Northern District a suit brought by the United States against the state of Georgia, seeking to desegregate the schools in 81 school districts in the state, including Hancock County. Representatives of black citizens of these school districts were allowed to intervene for the purpose of contesting formulas established by that court for faculty and pupil integration. Under these circumstances, the appellate court held that the district court did not abuse its discretion in dismissing the suit. For had the case been tried in the Middle District, there would be a possibility of conflicting decisions involving the same school district. The decision of the district court was affirmed.

Singleton v. Jackson Municipal Separate School District
419 F.2d 1211
United States Court of Appeals, Fifth Circuit,
December 1, 1969.

Singleton v. Jackson Municipal Separate School District
Carter v. West Feliciana Parish School Board
90 S.Ct. 608
United States Supreme Court, January 14, 1970.

(See page 27.)

Illinois

United States v. School District 151 of Cook County, Illinois
432 F.2d 1147
United States Court of Appeals, Seventh Circuit,
September 8, 1970.

Certiorari denied, 91 S.Ct. 1610, May 3, 1971.

(See *Pupil's Day in Court: Review of 1969*, p. 28; *Review of 1968*, p. 34.)

The school board appealed from the district court order adopting the government's desegregation plan. The three previous decisions in this case had the common holding that the policies, practices, and decisions of the school-board members had been based upon unconstitutional racial discrimination depriving black pupils of equal protection of the law in violation of the Fourteenth Amendment with respect to the drawing of attendance zones, pupil and teacher assignment, bussing of pupils, and selection of sites for additional schools.

On appeal the school board challenged many of the findings of the district court with regard to the racial segregation in the schools. The appellate court held that there was evidence to support the findings and that there was also ample support for the ultimate finding that the pupils in School District 151 were unconstitutionally segregated by race, the result of which has been a dual school system. The higher court found no merit in the school-board contention that because the racial pattern of the area was an innocent development, the racial discrimination and segregation in the schools were likewise the result of innocent good-faith performance on the part of the school board. Also without merit was the school board's claim that it could not carry out the desegregation plan because of financial difficulty. The court was unpersuaded in view of the fact that the school district was only 4½ miles square and the additional cost of bussing was expected to be $15,000.

The appellate court noted that after the decision on the first appeal, the school board made no effort to submit a desegregation plan and up to almost the end of the hearing after remand did not even inquire of the school superintendent if there were alternatives to the plans proposed by the government. This in itself, the appellate court ruled, justified the district court's adoption of the government plan which it found was educationally sound. The appellate court approved the order of the district court with one modification. The appellate court held that K-2 children from one school should not be transferred unless their parents approved. It was the opinion of the court that the parents of these small children were best suited to decide whether it was more beneficial to the children to be close to home or bussed to other schools.

NOTE: The Supreme Court of the United States declined to hear an appeal from this decision.

Louisiana

Johnson v. Jackson Parish School Board
423 F.2d 1055
United States Court of Appeals, Fifth Circuit,
March 25, 1970.

(See *Pupil's Day in Court: Review of 1967*, p. 16-17.)

Black pupils in four Louisiana school districts, including Jackson Parish, appealed from an order of the district court that approved plans presented by the school boards to desegregate the schools which did not in fact do so. The appellate court reversed the decision (420 F.2d 692 (1969)) and remanded the cases to the district court with instructions that the school districts immediately begin to operate as unitary systems.

On remand the district court approved a plan submitted by the Jackson Parish School Board to close three black schools and to utilize pairing and zoning to insure the integration of the remaining schools. No mention was made in the plan or the order concerning the manner in which pupils were to be assigned to classes within the schools. In practice the classes from the former schools remained intact with the same teachers. Although the schools were technically desegregated, the classes were not.

The appellate court again reversed the lower court and ordered the school board to immediately eliminate the dual system of pupil attendance and integrate the classrooms within the schools.

Robertson v. Natchitoches Parish School Board
431 F.2d 1111
United States Court of Appeals, Fifth Circuit,
August 31, 1970.

An appeal was brought by the black pupils, challenging the decision of the district court in approving a desegregation plan for the parish (county). When this case was remanded in 1969, a bi-racial committee was formed. This committee filed written recommendations with the district court. The desegregation plan approved by the court was also approved by that committee, except that the court ordered more extensive pairing of schools than the committee had recommended.

The parish is made up of one ward in the city of Natchitoches and nine wards in the predominantly rural portion of the parish outside the city. The appellate court found that under the approved plan the schools in the city and eight of the 14 rural schools were free from any trace of segregation and were not racially identifiable. One school that was almost completely white, the court found, was in an area cut off by a river without bridges so that "the composition of the student body is caused by immutable geography, not racial reasons." In another ward where there were two schools each attended by predominantly one race, the appellate court found that the distances were too great for children to be bussed. However, it directed that another effort be made in this ward to integrate the schools further. The appellate court found that no black families lived in ward eight where the only school was all-white, and that the area was so sparsely settled that there was no practical way to desegregate the school. Ward nine had two schools which were classified as all-black. The patrons of this area were mulattoes who did not wish to give up their school. Neither the U. S. Department of Health, Education, and Welfare nor the school board wished to interfere with the school, nor did the plaintiffs suggest that the court do so. HEW did suggest that the other school in this ward be paired across ward lines. Despite the absence of a road directly connecting the two schools, the appellate court directed another effort be made to pair the schools.

The appellate court retained jurisdiction of the appeal and remanded the case to the district court with directions that the schools be operated under the existing plan for the first semester of the 1970-71 school year. The district court was requested to direct HEW, the parish school board, and the bi-racial committee to make a thorough study and report as soon as possible as to any educationally feasible plan or plans to desegregate the remaining racially identifiable schools.

Singleton v. Jackson Municipal Separate School District
419 F.2d 1211
United States Court of Appeals, Fifth Circuit,
December 1, 1969.

Singleton v. Jackson Municipal Separate School District
Carter v. West Feliciana Parish School Board
90 S.Ct. 608
United States Supreme Court, January 14, 1970.

(See page 27.)

Smith v. St. Tammany Parish School Board
316 F.Supp. 1174
United States District Court, E.D. Louisiana,
New Orleans Division, August 21, 1970.

(See *Pupil's Day in Court: Review of 1969*, p. 35.)

The black pupil-plaintiffs in this school desegregation case moved for additional relief. They sought an injunction requiring the school board and its employees to remove from the system's schools all Confederate battle flags and other symbols or indicia of racism and to prohibit the official display of such flags or symbols. The pupils also asked that the previous court desegregation order be modified by adding a provision relating to a bi-racial committee and the appointment of a black assistant principal for one high school.

The court noted that since the original Supreme Court order mandating integration of the schools, the Confederate flag has become a symbol of resistance to school integration and to some, a symbol of white racism in general. The court ruled that such display was not permissible in a unitary school system. The court ordered that all Confederate flags, banners, signs expressing the school board's or its employees' desire to maintain segregated schools, and all other symbols or indicia of racism be removed from the schools and not be displayed at school functions of any kind. The court ruled that these prohibitions would not bar individual pupils from wearing or displaying buttons, signs, or symbols.

The court also granted the other relief sought by the pupils. It directed that a bi-racial committee be established and be composed of two members from each ward, one chosen by the school board and the other chosen by the black community in each ward. The board was additionally directed to appoint a black assistant principal for one particular high school by September 10, 1970.

Maryland

Borders v. Board of Education of Prince George's County
269 A.2d 570
Court of Appeals of Maryland, October 15, 1970.

Parents of school children in Prince George's County sought a declaratory judgment that the redistricting of the county school attendance zones was in violation of the Fourteenth Amendment because their children "solely because of their race" were being transferred to different schools. The school board maintained that it had the power under state law to determine school attendance areas and that the laws of the United States granted the board the right to establish attendance areas upon factors that included racial balance. The lower court agreed with the board of education and dismissed the complaint. The parents then appealed.

The appellate court held that it was error for the trial court to dismiss the complaints without an evidentiary hearing. There was factual dispute concerning both the motives and the bases of the changed attendance areas. The appellate court said that these matters could have a critical effect on the constitutional question involved, yet they were left unresolved by the procedure in the trial court. The case was remanded with the suggestion that the trial court await the forthcoming Supreme Court decision in *Swann v. Charlotte-Mecklenburg* (see page 31 of this report) for guidelines in the resolution of this case.

Massachusetts

Parris v. School Committee of Medford, Massachusetts
305 F.Supp. 356
United States District Court, D. Massachuetts,
October 31, 1969.

Black pupils and parents sought declaratory and injunctive relief restraining the Medford school committee from applying Massachusetts law designed to promote racial balance in the schools in such a manner as to deny black children and parents the equal protection of the law. More narrowly, the parents and the pupils alleged that one grammar school in Medford is racially imbalanced and that the plan of the school committee to alleviate that imbalance involves bussing black children out of the attendance district but does not involve bussing white children into the district.

The district court found itself bound by a controlling case of *Springfield School Committee v. Barksdale*, from the Court of Appeals of the First Circuit, which held that the district court was not to grant injunctive relief when there was pre-litigation-instituted good faith administrative attempts on the part of the school committee to cure racial imbalance. Since the Medford school authorities were attempting to work out a solution for the relatively limited racial imbalance in the one elementary school, the court "would not interfere *at this time*" with these administrative attempts.

The complaint of the parents and the pupils was dismissed.

Michigan

Davis v. School District of the City of Pontiac, Inc.
309 F.Supp. 734
United States District Court, E.D. Michigan, S.D.,
February 17, 1970.

Black children brought a class action against the Pontiac school district, charging that the board members and the school superintendents individually and in concert discriminated against them in denying them the right to be educated on the same and equal terms with white children and that they had discriminated in the hiring and assignment of teachers and administrators. The pupils contended that zone attendance lines for elementary schools were drawn with the purpose and/or effect of maintaining separate schools for black children and that the board has knowingly permitted segregated faculties to exist when they could have been avoided.

Since 1948, the school board had published a series of resolutions that stated that the board was committed to integrated education for the children of the district. However, it was apparent to the court that despite these pronouncements and resolutions, "the testimony clearly reflects that the Board of Education *never* considered achievement of racial balance as a factor in setting the original boundaries." From all of the evidence the court concluded that the board intentionally utilized the power at its disposal to set boundary lines and particularly to locate new schools in such a way as to perpetuate the pattern of segregation in the city, in contradiction of the announced policies of the board. The court said that the board cannot absolve itself from responsibility by saying that it did not create housing segregation in the city when it had the power to achieve an integrated student body.

The court also found that the faculties of the schools were segregated. Although a few teachers taught across racial lines, most faculties reflected the race of the pupils in the school. The court held that the segregation of the faculties alone justified a finding that the board was guilty of *de jure* segregation. The fact that pursuant to contract a teacher must be consulted prior to a transfer does not, the court said, negate the fact that the board had the power to effectuate transfers so as to assure quality education. The court held that the board had failed to prove that the segregated faculties did not result from discriminatory practices on the board's part.

The court concluded that the school board could not use the neighborhood school concept as a disguise for the furtherance or perpetuation of racial discrimination when it participated in the segregation. The court ruled that the school board must integrate its school system at all levels, student body, faculty, and administrators, before the beginning of school in September 1970. The school district was directed to submit before March 16, 1970, a comprehensive plan for the complete integration of the system. Such integration shall be accomplished by revising boundary lines as well as by bussing so as to achieve maximum racial integration. The court suggested to the board that it consult the U. S. Department of Health, Education, and Welfare for advice.

Mississippi

Green v. Kennedy
309 F.Supp. 1127
United States District Court, District of Columbia,
January 12, 1970.

Black taxpayers and their children attending Mississippi public schools brought suit against the Secretary of the Treasury and the Commissioner of Internal Revenue to enjoin them from granting tax-exempt status to private schools in Mississippi which discriminate against blacks in admissions. The parents claimed that certain sections of the Internal Revenue Code are unconstitutional to the extent that they support the establishment and maintenance of segregated private schools through tax benefits and particularly through income tax deductions granted to persons making contributions to such schools. The parents sought to enjoin the issuance of any further tax exemptions to such schools and the rescission and revocation of any approvals already granted.

The position of IRS announced in August 1967 was that exemptions would be denied to segregated schools whose involvement with the state or political subdivision was such as to make the operation of such schools unconstitutional. However, those segregated schools without this degree of involvement would be issued rulings of tax-exempt status and contributions to these schools would be tax deductible.

The three-judge federal court that was convened to hear the case adopted the findings in *Coffey v. State Educational Finance Commission* (296 F.Supp. 1389 (1969)) for the purpose of ruling on the parents' motion for a preliminary injunction. That decision declared unconstitutional the state program of tuition grants to private segregated schools. On the evidence and findings in the *Coffey* case and the depositions filed with the court in the instant proceedings, the court found that segregated private schools have been established in Mississippi to avoid the result of a unitary nonracial public school system required by federal court decisions outlawing segregation in public schools and in an attempt to maintain a broad pattern of racial segregation in the school system. Although the instant case did not involve grants, the court found little difference between the tax-exempt status of the private schools and the outright tuition grants that were invalidated in *Coffey*. The court said that the tax benefits under the Internal Revenue Code meant a substantial and significant support by the government to the segregated private school pattern, and thus a substantial question is raised by the parents' claim that this support is a derogation of constitutional rights. The significant support was not the exemption of the schools from taxes but the tax deductions given individuals and corporations for contributions to the schools. Looking at the findings of the *Coffey* case, the court noted that the new segregated schools operated on the thinnest financial basis. Other evidence in the instant suit indicated that the schools depended on the contributions for capital financing and building. The court also found it noteworthy that no applications were filed for tax-exempt status until after the first school desegregation suit was filed in Mississippi.

The court observed that although there was no allegation that it was the purpose of the federal regulations to foster segregated schools, the due process clause of the Fifth Amendment does not permit the federal government to aid private discrimination in any way that would be prohibited to the states under the Fourteenth Amendment. The court said that the IRS could not interpret the statute so narrowly as to exclude from an exempt status only those schools whose operation was under color of state law since this definition disregarded the impact of past state action and support, and ignored the significance of current federal support from tax benefits. Because of past discriminatory practices which resulted from state mandate or state support and involvement, the court continued, the state was under a duty to establish a unitary, nonracial school system. Therefore, the federal government "is not constitutionally free to frustrate the only constitutionally permissible state policy, of a unitary school system, by providing government support for endeavors to continue under private auspices the kind of racially segregated dual school system that the state formerly supported."

The court issued a preliminary injunction enjoining the Internal Revenue Service from issuance of further ruling letters to any private elementary or secondary school in Mississippi unless it has affirmatively determined on the basis of adequate investigation that the applicant school does not discriminate against blacks in its admission policies and from determining that any contribution to such a school is tax deductible by donors. The court declined at this point to order IRS to withdraw tax-exempt rulings already issued since this could be done at a later date after a trial on the merits.

Singleton v. Jackson Municipal Separate School District
419 F.2d 1211
United States Court of Appeals, Fifth Circuit,
December 1, 1969.

Appeals from 16 school systems in six southern states, Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas, were consolidated for opinion purposes. Each of the cases was considered anew in light of *Alexander v. Holmes County* (90 S.Ct. 29) which held that school districts must immediately convert to unitary systems. The Fifth Circuit Court of Appeals held that faculties, staffs, transportation facilities, athletics, and extracurricular activities must be merged by the start of the next semester. The districts were permitted one additional semester, not later than the start of the fall 1970 school term to integrate the student bodies of the schools. (This time schedule was upset by the Supreme Court. See next digest.)

The appellate court laid down the following guidelines as the minimum that would be accepted by February 1, 1970: The districts were ordered to assign principals, teachers, teacher aides, and other staff who worked directly with children so that in no case would the racial composition of each school indicate that the school was tailored for children of one particular race. The school systems were directed to achieve a ratio of black to white teachers and a ratio of other staff in each school substantially the same as the ratio of teachers and other staff in the entire system. Each district was to direct members of its staff, as a condition of continued employment, to accept the new assignments. If integration produced a reduction in the number of positions in the district, the staff member to be dismissed or demoted was to be selected on the basis of objective and reasonable nondiscriminatory standards from among the staff of the entire district. If there were any such dismissals or demotions, no staff vacancy could be filled through recruitment with a person of a different race, color, or national origin from that of the displaced person until all displaced, qualified staff members had an opportunity to fill the vacancy and had failed to do so.

Prior to any reduction in staff the school board was to prepare nonracial, objective criteria, available for public inspection, to be used in any staff reduction situation. Any evaluations made of staff members under the criteria were to be preserved and made available to the dismissed or demoted person upon request.

Districts were directed to implement a pupil majority to minority transfer policy. In those systems having transportation programs, bus routes, and the assignment of pupils to busses were to be designed to insure the transportation of all eligible pupils on a nondiscriminatory basis. All new school construction, including temporary classrooms, was ordered to be done in a manner which would prevent the recurrence of the dual school system. Any transfers of pupils living in the district to public schools located outside the district must be granted on a nondiscriminatory basis except that the district was directed not to grant transfers where the cumulative effect would reduce desegregation in either district or re-enforce the dual school system.

Additional orders were entered pertaining to the individual school districts. The court said that a stay would not be granted pending motions of the school districts for rehearing or appeals to the Supreme Court of the United States.

The cases were remanded to the lower courts for action in compliance with the opinion.

Singleton v. Jackson Municipal Separate School District
Carter v. West Feliciana Parish School Board
90 S.Ct. 608
United States Supreme Court, January 14, 1970;
U. S. Court of Appeals, Fifth Circuit,
425 F.2d 1211, January 21, 1970.

(See case immediately above.)

On appeal to the Supreme Court of the United States, the decision above was reversed in part. The Supreme Court said: "Insofar as the Court of Appeals authorized deferral of student desegregation beyond February 1, 1970, that court misconstrued our holding in *Alexander v. Holmes County* . . . ." The cases were remanded to that court for further proceedings.

Accordingly, the Fifth Circuit Court of Appeals on January 21, 1970, reversed its judgment with respect to deferral of pupil desegregation beyond February 1, 1970, but ordered that all other provisions of its order in *Singleton* remain in full force and effect.

Singleton v. Jackson Municipal Separate School District
426 F.2d 1365
United States Court of Appeals, Fifth Circuit,
May 5, 1970; rehearing denied and rehearing en banc denied July 13, 1970.

Certiorari denied, 91 S.Ct. 1611, May 3, 1971.

(See cases above under this title.)

(See also *Pupil's Day in Court: Review of 1966*, p. 21; *Review of 1965*, p. 28; *Review of 1964*, *Evers v. Jackson Municipal Separate School District*, p. 38-39.)

Following the remand of this case by the appellate court, the district court approved a desegregation plan for the Jackson school district. The black pupils appealed.

The appellate court found that although the faculty, staff, facilities, and extracurricular activities of the system would be integrated, the plan would leave a substantial number of schools with segregated student bodies. The court was of the view that the system was not a unitary one because a substantial number of black pupils would receive their entire public-school education in a segregated school environment.

The decision of the district court was reversed, and the case was remanded with instructions that a majority to minority transfer rule be instituted and all transferring pupils be given transportation if they so desired. Transferring pupils were to be given priority for space. Secondly, the school district was directed to adopt one of the presently available plans offered by the U. S. Department of Health, Education, and Welfare for the secondary level rather than the plan approved by the lower court. The plan adopted was to remain in effect until after substantial operation during the 1970-71 school year, if it could be shown what modifications, if any, would be necessary to assure the operation of a unitary system at this level. The district court was directed to initiate proceedings without delay to eliminate the dual system that still remained at the elementary level, and to call for new proposals from the parties to the suit, HEW, and the Bi-Racial Committee which is to be constituted. All findings and orders were to be completed by June 15, 1970, so that pupil assignments could be complete by July 1, 1970. The district court was also directed to retain jurisdiction of the case for further relief if that should prove necessary.

Singleton v. Jackson Municipal Separate School District
430 F.2d 368
United States Court of Appeals, Fifth Circuit,
July 20, 1970.

(See cases above under this title.)

In the case immediately above, the district court was directed to select one of the three available U. S. Department of Health, Education, and Welfare plans for desegregation of the secondary schools in Jackson. However, at the hearing to select the plan, school officials and HEW officials testified that because of population shifts, relocation of portable classrooms and incomplete original information, all three available plans would have to be modified to be workable in the 1970-71 school year.

The district court felt that under the mandate of the appellate court it had no power to vary the plan and accordingly ordered Plan A to be put into effect by June 15, 1970. At the same time, it asked HEW to suggest modifications to make the plan more workable. This was done, and one set of modifications was presented for the junior high schools and two alternate sets were presented for the senior high schools. The school district in this case sought to modify the previous appellate court order to permit implementation of the HEW changes.

The appellate court accepted the recommendations of the district court as to changes in the original HEW plan. The black pupil-plaintiffs had made initial objections to any modifications, but later conceded that the changes were necessary. The district court had chosen one of the two alternate proposals for the high schools, while plaintiffs indicated they preferred the other. The appellate court found very little difference between the alternatives and permitted the district court choice to stand. The appellate court did caution that close attention must be given to one predominantly black school, but did not believe that its racial composition destroyed the unitary character of the school system. The appellate court approved the HEW Alternate II modifications to Plan A and altered its previous mandate accordingly. It concluded with the statement that care would have to be taken to see that schools did not become resegregated with population shifts.

Singleton v. Jackson Municipal Separate School District
432 F.2d 927
United States Court of Appeals, Fifth Circuit,
August 12, 1970; supplemental order August 25, 1970.

(See cases above under this title.)

Pursuant to the mandate in the May 5, 1970, decision of the appellate court, the district court adopted a desegregation plan for the elementary schools formulated by the bi-racial committee. The school board supported the committee plan. The plaintiffs on the other hand suggested substantial changes in the January 1970 plan proposed by the

U. S. Department of Health, Education, and Welfare and appealed when the committee plan was adopted.

The appellate court found the approved plan to be unacceptable. Under the plan 70 percent of the black elementary-school pupils would attend all-black or substantially all-black schools. The appellate court then directed as an interim measure pairings and clusterings of designated schools as modifications to the plan which would reduce the number of black pupils in segregated schools from 70 percent to 20 percent. The district court was directed to hold a hearing not later than September 25, 1970, to canvass the entire elementary system for whatever changes were needed. All changes were to be implemented by January 1971.

In its supplemental order the appellate court modified its August 12, 1970, order by deleting the requirement that the schools operate under the mandated pairings for September conditioned on the district court's holding of an immediate hearing prior to the opening of school. Permission was given to delay the opening of the elementary schools pending the issuance of a new comprehensive order of the district court so that midyear disruptions would not be necessary.

United States v. Sunflower County School District
430 F.2d 839
United States Court of Appeals, Fifth Circuit,
August 13, 1970.

The school district appealed from the district court order concerning desegregation of the school system. The school system had been directed (a) to rescind its assignment of pupils based upon an achievement testing program and (b) to establish a unitary school system. On appeal the school board challenged that portion of the lower court order relating to the testing program.

The appellate court said that it was obvious that the schools were being operated as a dual system, and that the district court order for termination of the dual system was in accordance with Supreme Court directives. The appellate court noted further that it had previously rejected assignment based on test scores as a method of desegregation in other cases wherein it had concluded that "testing cannot be employed in any event until unitary school systems have been established." This holding was applicable in this case and the judgment of the district court banning the testing program was affirmed.

New York

Udut v. Nyquist
314 N.Y.S.2d 396
Supreme Court of New York, Niagara County,
September 17, 1970.

Parents of white school children in the Niagara Falls public schools sought a preliminary injunction against state and local school officials to restrain the local school board from effectuating "Plan 21." The parents alleged that this adopted plan altered school attendance districts to promote intergroup education and that certain children were to be transferred from schools near their homes to schools farther away by means of bussing without their parents' consent. They also alleged that the plan was unconstitutional and that it lessened the rental and sales value of their real estate.

The board of regents of New York in 1968 had recommended to school boards that they develop a plan for achieving and maintaining racially integrated schools. The court found that Plan 21 did so. The regents later stressed that interracial understanding could best be achieved by children of different races and social and economic groups attending school together. The court found that Plan 21 achieved this interracial understanding for all children involved. The court said that in adopting the plan the board of education had "acted with care, caution, and the utmost deliberation and did not act arbitrarily or capriciously in disregard of the rights of any individual or groups within the boundaries of the school district."

The plan which was adopted in June 1970 and placed in operation at the opening of schools in September 1970, involved transportation of some 1,300 pupils out of 9,000 elementary-school pupils in the district. It was the bussing *per se* that the parents objected to. The court found that children are bussed when they attend junior high school and that bussing is common in rural areas. The court also found that Plan 21 bussed only 31 pupils beyond normal geographic school zones. State law provides that only with the approval of the board of education, a majority having been elected, can pupils be assigned for the purpose of racial balance. In this instance the board of education had been elected and was acting within its jurisdiction.

The court concluded that the section of the education law permitting the transfers was constitutional, that the plan itself was constitutional since it was not arbitrary or a denial of equal protection, and that the complaint of the parents was insufficient. The requested injunction was therefore denied.

North Carolina

Scott v. Winston-Salem/Forsyth County Board of Education
317 F.Supp. 453
United States District Court, M.D. North Carolina,
Winston-Salem Division, June 25, 1970.

Black pupils in the Winston-Salem/Forsyth County school district brought suit against the school district and various state school officials, charging that the district was being operated as an unconstitutional dual school system. The school district was made up of Forsyth County and the city of Winston-Salem. Most of the black population of the district lived in the northern and eastern portions of the city. The findings of fact showed that from 1965 to 1969 the district had made some progress in desegregating the schools. The only remaining overlapping attendance zone and bus route had been eliminated, a geographic zone plan had been adopted with a free-transfer provision, and a high school had been closed, resulting in more integration at nearby high schools. However, predominantly black and predominantly white schools did remain in the district. The court found that all 16 of the all-black or predominantly black schools in operation during the 1969-70 school year were compacted in a small area that encompassed densely populated, black neighborhoods. The court also found that most of the predominantly white schools could not achieve any great degree of racial mixing without substantial cross-bussing.

There were two proposed plans before the court. The first had been drawn up by an expert witness for the plaintiffs, and this plan would hope to attain, as close as possible, an average of 27.5 percent black pupils in each school. The court held that the amount of bussing that would be required to implement this plan and the distances that small children would be required to travel would place such an undue burden on the school board and on the children that it would far outweigh any benefits that might be derived from the plan.

The second plan before the court, presented by the school board involved geographic zoning with a majority to minority transfer provision. Transferees would be provided free bus transportation, and all requests would be honored up to 10 percent over the normal capacity of a given school. The board also proposed to close schools, convert schools, and change boundary lines so that integration would be increased.

The court found that other than desegregation of the student bodies of the schools, the district was operating as a unitary system in all other respects. In almost every school the ratio of black to white faculty members approximated the ratio in the system as a whole. The transportation system, extracurricular activities, and athletics were completely desegregated.

The court said that the school board had the burden of showing that schools attended by children of one race were not the result of discrimination and met the reasonableness test. The board had undoubtedly made a determined effort to overcome the problems concerned with desegregation. The question was whether the board had done enough. The court found that without massive cross-bussing, some all-black and some all-white schools would remain. The court did not find any evidence of gerrymandering on the part of the school board to avoid integration, as plaintiffs contended, but the boundaries of the zones were drawn so that the children attended the school nearest their homes. The court concluded that much of the residential segregation in the city was not the result of deliberate practices, but was dictated by economic factors and the preference of blacks for certain neighborhoods.

Taking everything into account, the court directed the school board to file a revised desegregation plan that included a provision barring minority to majority transfers, reasonable integration of three elementary schools that bordered white elementary schools by means of pairing, clustering, or other available methods, and a summary of innovative programs to increase contact between the races. The board was also directed to complete plans for the construction of two new high schools for which a bond issue had already been approved. The plaintiffs were given seven days after the filing of the school board plan to file objections. The action as against the various state officials and county commissioners named as defendants was dismissed.

Swann v. Charlotte-Mecklenburg Board of Education
306 F.Supp. 1291
United States District Court, W.D. North Carolina,
Charlotte Division, August 15, 1969.

(See *Pupil's Day in Court: Review of 1969*, p. 41; *Review of 1967*, p. 34; *Review of 1965*, p. 39.)

Pursuant to a previous district court order, the school board submitted an amended school desegregation plan. The plan proposed, among other things, to close seven all-black schools and to assign the 3,000 pupils in these schools to outlying, predominantly white schools. The board also proposed to integrate the faculty, to reassign pupils from overcrowded black schools to outlying white schools, and to build and improve schools with the object of integration.

The plaintiffs objected to the portion of the plan that closed the black inner-city schools and assigned pupils to outlying white schools, contending that the burden of desegregation was then placed on the black children. The court said that it was not its intention to place the burden of desegregation primarily on one race, but because of the short time remaining prior to the opening of school for the fall term, it would approve the plan for one year only with great reluctance and with the distinct reservation that "one-way bussing" plans would not be acceptable after the 1969-70 school year. The remainder of the school-board plan was approved. The school board was also directed to file with the court by November 17, 1969, plans for complete faculty and pupil desegregation for the 1970-71 school year, including making full use of zoning, pairing, grouping, clustering, and transportation.

Swann v. Charlotte-Mecklenburg Board of Education
306 F.Supp. 1299
United States District Court, W.D. North Carolina,
Charlotte Division, November 7, 1969; supplementary opinion and order, December 1, 1969.

(See case immediately above.)

The board of education sought an extension of time for compliance with the district court order in the case above. This motion for additional time was denied on the basis of the decision of the Supreme Court of the United States in *Alexander v. Holmes County* (90 S.Ct. 29, (1969)). That case had held all motions for more time should be denied because "the obligation of *every school district* is to terminate dual school systems at once and to operate now and hereafter only unitary schools."

The district court noted that the July 29, 1969, plan proposed by the board for desegregation had not been carried out as contemplated. Instead of transferring 4,245 black pupils to white schools, only 1,315 had been transferred. And although some progress had been made in faculty desegregation, 98 of the 106 schools in the district had racially identifiable faculties.

In its supplementary opinion, the district court considered the amended plan ordered to be filed by the school district by November 17, 1969. The proposed plan submitted by the board contemplated that no school to which white pupils were assigned would have less than 60 percent white pupil population and also contemplated the continued operation of all-black schools. The plan also eliminated transportation that was to be provided to aid children transferring out of segregated schools. Other methods, such as pairing, grouping, and clustering of schools to reduce segregation, were expressly left out of the plan. Nor did the plan have a timetable to complete the faculty and student desegregation. The court found the result of the plan to be continued segregated education in the school district which resulted in unequal education for the black pupils in the segregated schools.

Consequently, the district court disapproved the plan of the school board and directed the board to desegregate the faculties of the schools not later than September 1970 so that the ratio of black to white teachers in each school approximated the ratio of black to white teachers in the school system as a whole. The court decreed that a consultant be designated to prepare immediately plans and recommendations to the court for the desegregation of the schools. The school board was directed to cooperate fully with the consultant, including providing office space and equipment, paying all fees, and granting full access to all information about all phases of the school system which may be necessary to prepare plans or reports. Any assistance, professional, technical, or other, was also to be provided by the school district. Jurisdiction was retained by the district court.

Swann v. Charlotte-Mecklenburg Board of Education
311 F.Supp. 265
United States District Court, W.D. North Carolina,
Charlotte Division, February 5, 1970.

(See cases above under this title.)

Pursuant to the December 1, 1969, order of the district court, Dr. Finger was appointed a consultant to advise the court on how the Charlotte-Mecklenburg school system could be desegregated. The school board was also extended another opportunity to submit a plan. The plan subsequently submitted by the board relied almost entirely on geographic attendance zoning and left many schools still segregated. The Finger Plan incorporated most of those parts of the board plan which achieved desegregation in particular districts by rezoning, but went further and produced desegregation in all of the schools of the system.

Reiterating its December 1, 1969, opinion, the court held that the default on the part of the board to submit a lawful plan that desegregated all the schools left the court in the position of being forced to prepare or choose a desegregation plan. The court said that the fairest way to deal with the situation, as stated in its December 1, 1969, order, was that efforts be made to reach a 71-29 ratio in the various schools (the white-black pupil ratio in the entire system), but with the understanding that variations from the norm might be unavoidable. Therefore, in accordance with the detailed guidelines in that order, the court ordered that the faculty be desegregated as previously ordered and that teachers be assigned so that the competence and experience of teachers in formerly black schools was not less than the competence and experience of teachers in formerly white schools. The court also ordered that no school be operated with an all-black or predominantly black student body, that they all have as nearly as practicable the same proportion of black and white pupils, and that all children assigned to schools beyond reasonable walking distance from their homes be provided with free transportation. School-board estimates of the cost of this additional transportation were found by the court to be less than 1 percent of the cost of operating the schools. However, the court said the significant point is that cost is not a valid legal reason for the continued denial of constitutional rights. The court directed further that free choice and free transfer may not be allowed by the board if the effect of the transfer or transfers is increased segregation.

Specifically the court refused to approve the school-board elementary-school desegregation plan and directed that with the qualifications previously stated the school board follow the Finger plan for the elementary schools. Desegregation of the elementary schools was to be accomplished no later than April 1, 1970. With regard to the junior high schools, the board was given several options with the provision that if the board failed to make an affirmative decision by February 9, 1970, the Finger plan for this level was to be put into effect and desegregation completed not later than May 4, 1970. The school-board plan for the senior high schools was approved with one exception, that 300 black students be reassigned. Twelfth-grade students were permitted to remain in their present schools until the end of the school year, but all other senior high-school students were to be in their new schools not later than May 4, 1970. The deadline for faculty desegregation was the same as that for desegregation of the student bodies at the various levels. Immediate steps were ordered to be taken to bring about compliance with the order.

Swann v. Charlotte-Mecklenburg Board of Education
Moore v. Charlotte Mecklenburg Board of Education
312 F.Supp. 503
United States District Court, W.D. North Carolina,
Charlotte Division, April 28, 1970.
Certiorari granted, 91 S.Ct. 11, October 6, 1970.

(See cases above under this title.)

A three-judge federal court was convened to hear a challenge to the constitutionality of the North Carolina "anti-bussing" statute. The suit arose prior to the district court order of February 1970 (see the cases directly above) which would have required the bussing of 13,300 additional children, when certain parties filed suit in state court to prevent the purchase of additional buses for the required transportation of children. The state court granted a temporary injunction, and the plaintiffs in *Swann* moved in the district court to add the state plaintiffs as parties to the suit and to direct all parties from interferring with the federal court mandates. Following the February 1970 district court decision, another state court suit was filed, seeking the same relief. Again it was granted, and again the *Swann* plaintiffs sought to add the state parties as defendants in the federal suit. At the same time defendants in the state suit moved to transfer it to the federal court. All of the cases were consolidated for trial before a three-judge federal court.

The anti-bussing statute was interpreted by the black plaintiffs and by the state attorney general as limiting the lawful methods of accomplishing desegregation to non-gerrymandered geographic zoning and freedom of choice. The school board interpreted the statute to mean that the prohibitions against bussing applied only after a unitary system was achieved, and since it was contended that Charlotte-Mecklenburg was a unitary system, the state court had constitutionally applied the statute to prevent further unnecessary racial balancing.

The three-judge court agreed with the plaintiffs' and attorney general's interpretation of the statute—that it limits the remedies otherwise available to school boards to desegregate the schools. The question considered by the court was whether the limitation imposed by the statute was valid or in conflict with the Fourteenth Amendment. Under Supreme Court decisions mandating a unitary system, only plans that work to achieve a unitary system are valid.

With regard to the anti-bussing statute the court said that "a statute favoring the neighborhood school concept, freedom-of-choice plans, or both can validly limit a school board's choice of remedy only if the policy favored will not prevent the operation of a unitary system." That this may or may not be would depend upon the facts of the particular situation. The flaw in this legislation, the court stated, is its rigidity. The court held that as an expression of state policy the statute was valid. However, to the extent that it may interfere with the board's performance of its constitutional duty, to establish a unitary system, it was invalid.

Analyzing the statute by paragraph in the light of these principles, the court held the first portion that mandated nondiscrimination to be constitutional. Likewise declared constitutional was the third paragraph which stated that the provisions of the statute did not apply to temporary assignments caused by the unsuitability of a building or assignments to relieve overcrowding or other assignments made necessary by other circumstances which the board deemed to require assignments or reassignments. The court said that this paragraph merely allows the school board noninvidious discretion to assign pupils to schools for valid administrative reasons. The fourth paragraph provided for assignments based upon a choice exercised by the pupil and his parents pursuant to a freedom-of-choice desegregation plan. Interpreting this to permit but not require freedom of choice, the court held this part constitutional.

It was the second paragraph of the statute that contained the constitutional infirmity. This portion of the statute provided that where the school district has established geographic attendance zones, pupils shall be assigned to schools within such zones and that "no student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing." The court held that the quoted portion was unconstitutional since it plainly prohibited school boards from assigning, compelling, or involuntarily bussing pupils on account of race or in order to racially balance the school system. The court said that the Constitution is not color blind with respect to the affirmative duty of school boards to establish and operate unitary systems. A flat prohibition against assignment by race would, as a practical matter, prevent school boards from altering dual systems. Consequently, the court ruled that the statute "clearly contravenes the Supreme Court's direction that boards must take steps adequate to abolish dual systems." The court said that as far as the prohibition against racial balance was concerned, school boards, in taking affirmative steps to desegregate a school system, must always engage in some sort of balancing.

The court concluded that a flat prohibition against racial balance violates the equal protection clause of the Fourteenth Amendment, as does a prohibition against involuntary bussing. "To say that bussing shall not be resorted to unless unavoidable is a valid expression of state policy, but to flatly prohibit it regardless of cost, extent and all other factors—including willingness of a school board to experiment— contravenes, we think, the implicit mandate of *Green* that all reasonable methods be available to implement a unitary system." Although the statutory provisions barring balancing and bussing were held unconstitutional, no opinion was expressed as to whether bussing would be an appropriate remedy, for that question was on appeal to the United States Court of Appeals for the Fourth Circuit.

NOTE: On April 20, 1971, the Supreme Court of the United States affirmed the decision of the three-judge district court. (91 S.Ct. 1292)

Swann v. Charlotte-Mecklenburg Board of Education
431 F.2d 138
United States Court of Appeals, Fourth Circuit,
May 26, 1970. Certiorari granted 91 S.Ct. 10,
October 6, 1970.

(See cases above under this title.)

The Charlotte-Mecklenburg board of education appealed from the February 5, 1970, order of the district court requiring that the faculty and student body of every school in the system be racially mixed. The black pupils also appealed, seeking full implementation of the Finger plan which was partially ordered implemented by the district court decision.

The appellate court held that not every school in an integrated school system need be integrated but that school boards must use all reasonable means to integrate the schools in their jurisdiction. If the black areas in a city are so large that they cannot be integrated by reasonable means, further steps must be taken to assure that no pupils are excluded from integrated schools because of race, such as making available special classes, functions, and programs on an integrated basis, and allowing majority to minority transfers with transportation provided. The court then adopted "a test of reasonableness" saying that if a school board makes every reasonable effort to integrate pupils, "an intractable remnant of segregation should not void an otherwise exemplary plan for the creation of a unitary public school system. The court said further that bussing is a permissible tool for achieving integration, but not a panacea. In determining who should be bussed and where, school boards should consider the age of the pupils, distance and time required for transportation, the effect of traffic, and costs in relation to the board's resources.

Applying the test of reasonableness to the plan approved by the district court, the appellate court affirmed the plan as it applied to the junior and senior high schools, noting that the increased transportation required would increase the number of students bussed to school by only 17 percent. As to the elementary schools, the appellate court held that the district court properly disapproved the school-board plan because of the number of children who would attend segregated schools under that plan. However, the appellate court did not find the Finger plan for the elementary schools to be reasonable, for this plan would increase the number of pupils bussed to school by 39 percent and would require an estimated 32 percent increase in the number of buses necessary. The appellate court did not believe that the school board should be required to undertake such extensive additional bussing to discharge its obligation to create a unitary school system. This portion of the district court judgment was therefore reversed, and the case was remanded to that court for reconsideration of the assignment of elementary-school pupils. It was suggested that on remand the district court direct the school board to consult experts from the U. S. Department of Health, Education, and Welfare to explore every method of desegregation. The appellate court noted that it was not prohibitng bussing of elementary-school children, and that in devising a new plan, the school board should not perpetuate segregation by rigid adherence to 60 percent white-40 percent black ratio it favors in each school.

The appellate court concluded that if despite all efforts of the school board to integrate every school, some all-black schools remained, the school board should take further steps along the lines mentioned above, including a majority to minority transfer plan to assure that no pupil is excluded from an integrated school on the basis of race. The school board was directed to immediately consult the experts from HEW and to present a new plan by June 30, 1970.

The Supreme Court of the United States granted a writ of certiorari for a review of this decision.

NOTE: On April 20, 1971, the Supreme Court of the United States ordered the district court desegregation plan reinstated, including the bussing of the elementary-school pupils. That Court found four problem areas in the issue of pupil assignment. With regard to racial ratios the Supreme Court said that "the constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." However, in this case the Court said that the very limited use made of mathematical ratios as a starting point to shape a remedy was well within the equitable remedial discretion of the district court. The Supreme Court said further that while schools attended solely or virtually by pupils of one race were not in themselves the mark of a segregated system, school boards have the burden of showing that such assignments are genuinely nondiscriminatory. Noting that an optional majority to minority transfer provision has long been recognized as a useful part of a desegregation plan, and stating that this provision is an indispensable remedy for pupils willing to transfer, the Court held that such arrangement to be effective must provide the transferring pupil free transportation and available space in the school to which he wishes to move.

Pairing and grouping of noncontiguous school zones were also held by the Supreme Court to be permissible tools. With regard to transportation, the Supreme Court held that although there might be valid objections to bussing, the remedial technique of required bussing ordered by the district court was within that court's power to provide equitable relief and within the capacity of the school board to implement. The court said that "desegregation plans cannot be limited to the walk-in school." (91 S.Ct. 1267)

Turner v. Warren County Board of Education
313 F.Supp. 380
United States District Court, E.D. North Carolina,
Raleigh Division, May 23, 1970.

Black plaintiffs sought a judgment declaring two enactments of the North Carolina state legislature unconstitutional and an injunction restraining the Warren County board of education from enforcing them. The preliminary injunction was issued, and this case involved a trial on the merits.

A court-approved plan of geographic zoning was to take effect for the 1969-70 school year to effectuate a unitary school system in Warren County. The racial composition of the district was 27 percent white, 67 percent black, and 6 percent Indian. In April of 1969, prior to integration, two local laws were enacted by the state legislature, creating administrative units for school attendance in Warrenton City and in the Littleton-Lake Gaston School District. One of these areas was predominantly white, the other had a slight black majority. The boards of education of the two new units adopted regulations permitting transfers in and out of the units and established a minimal tuition charge for nonresident pupils. If enforcement of the acts had not been preliminarily enjoined by the court the racial composition of the Warrenton City unit after transfers would have been 94 percent white, 2 percent Negro, and 4 percent Indian. The composition of the Littleton-Lake Gaston unit would have been 54 percent white and 40 percent black. The net effect of the transfers would have left the Warren County School System with a 93 percent black pupil population.

The two laws were enacted at a time when their proponents were motivated, at least in part, by the desire to avoid desegregation on a county-wide basis, and to carve out of the county system separate units that would offer a refuge for white pupils and preserve segregated schools in the county to the extent possible. The court said that the two acts "promote segregated schools in the Warren County system, impede and defeat the Warren County Board of Education from implementing its plan to desegregate all of the public schools in Warren County, and frustrate the lawful orders of this court."

The court also found that the creation of small school units could not be rationalized on a sound educational basis. It noted that a 1968 study of education in North Carolina found that 750 senior high-school students are needed for economical operation and recommended mergers and consolidations of smaller administrative units to achieve economical and effective schools. In this instance the legislature had carved out two smaller units, one with 206 resident students and the other with 659 resident students in grades 1-12. If race were disregarded, the court said, the creation of the two new units in Warren County was indefensible when population trends were considered. The population of the county had continually declined over the years, and a further decline was projected.

The question before the court was whether the state of North Carolina had denied to the black pupil-plaintiffs due process and equal protection of the laws by the enactment of the two laws. The court concluded that the state had a duty to the plaintiffs to take affirmative action to remove all remaining vestiges of the state imposed dual school system, that this duty extends to all branches of state government and to its departments and agencies who are charged by law with the exercise of any public-school function. It was clear to the court that the acts creating the two new school administrative units served no legitimate state interest, violated the state's duty to effectuate a unitary school system, and prevented the school board from complying with the court-approved plan for desegregation of the Warren County schools. The two acts were declared unconstitutional, null, and void, and the school officials were enjoined from any and all further proceedings in reliance on the enactments.

United States v. Halifax County Board of Education
314 F.Supp. 65
United States District Court, E.D. North Carolina,
Wilson Division, May 23, 1970.

The United States challenged the constitutionality of a 1969 local act of the North Carolina legislature which carved out a separate administrative unit for the town of Scotland Neck from the Halifax County school system. The United States contended that the act was unconstitutional because it was inconsistent with the duty of the state to dismantle its dual school system. The court entered a preliminary order enjoining the Scotland Neck board of education from operating as a separate unit. This decision involved the merits of the case.

Halifax County had operated a dual school system based on race and later freedom-of-choice plan. In 1968 it was informed by the U. S. Department of Justice that the freedom-of-choice plan was not in compliance with requirements to disestablish its dual school system. Negotiations between attorneys for the Justice Department and the school board resulted in a tentative agreement for implementation of a desegregation plan. Details of the desegregation plan were publicized in the local press, including papers in Scotland Neck. The county itself had a black majority, but the town of Scotland Neck had approximately a 50 percent black and a 50 percent white population.

As early as 1963 some of the leaders of Scotland Neck were concerned about the quality of education in that area and the fact that they were not receiving their fair share of county school revenues. The proponents of the act creating the separate unit stressed that quality education for the children of Scotland Neck was the motivation behind their desire for a separate administrative unit. The bill creating the unit also provided for a special tax increase for the support of schools. The board of education of Scotland Neck intended to operate a unitary school system, but would accept transfers from outside the town limits; it also would permit some black children living in the town to attend an all-black county school, but only until the 11th- and 12th-graders attending the black high school had graduated.

The net effect of the transfers would have been a substantial white majority in the Scotland Neck schools and a substantial black majority in the county system. Because of the controversial nature of the transfer plan, the Scotland Neck school board stated that if the unit were permitted to operate, it would limit its enrollment to pupils residing within the town limits plus or minus any transfers allowed by law and in accordance with a plan approved by the court.

The court found that the motivation behind the new district was a better education for the children as well as a desire to maintain an "acceptable ratio" of black and white pupils in order to avoid "white flight" and a desire of the people of Scotland Neck to control their own schools more than they were able to as part of the county system. There was lengthy testimony supported by historical treatment of Scotland Neck by the county school board to the effect that the primary reason for the new district was that the people of the town could have a better educational system, levy a supplemental tax for the schools which the county would not pass, and exert more local control over the schools. There was also testimony to indicate that "an acceptable white ratio" would prevent the white pupils from attending private schools and retain public support for public schools.

The United States argued that the unit would produce an inferior school system because of the small number of pupils in the unit. However, it was also pointed out that some smaller administrative units produce a quality program of education, and in any event the Halifax County system ranked near the bottom in a number of categories when compared with other school systems in the state.

The court found three legal principles applicable to this case. The first was that a federal court should be hesitant to declare a state statute unconstitutional; the second involved the constitutional duty of school boards and state and local school officials to guarantee black pupils their constitutional rights in the area of school desegregation; and the third was that acts generally lawful may become unlawful when done to accomplish an unlawful end. Additionally, the court referred to two recent cases involving similar situations. In ***Burleson v. County Board of Election Commissioners of Jefferson County*** (see page 18) and ***Wright v. County School Board of Greensville County*** (see page 38), federal district courts in Arkansas and Virginia prohibited the carving out of smaller administrative units for the purpose of avoiding desegregation.

Although the court found a more difficult problem in this instance because Scotland Neck agreed to modify its transfer provisions to conform to any court ruling, the operation of the separate school system was enjoined. The court said that the creation of the new unit would take some of the white pupils out of the Halifax County system and thereby reduce the proportion of white pupils in a school system that already had a black majority. It was apparent to the court that the act permitting the Scotland Neck unit was enacted with the effect of creating a refuge for white pupils of the Halifax County school system and that it interferred with the desegregation plan of the county system. Finding the act to be at least partially motivated by the desire to stem the flight of white pupils from the public schools, the court concluded that the act was unconstitutional and in violation of the equal protection clause of the Fourteenth Amendment. A judgment was entered enjoining the Scotland Neck school board from operating a school system separate from the Halifax County school system.

NOTE: Following reversal by the United States Court of Appeals, Fourth Circuit, an appeal was filed in the Supreme Court of the United States. (sub. nom *United States v. Scotland Neck Board of Education*, 39 U.S. Law Week 3542, June 8, 1971)

Whitley v. Wilson City Board of Education
427 F.2d 179
United States Court of Appeals, Fourth Circuit,
May 26, 1970.

Representatives of 123 white children assigned to a previously all-black elementary school brought a desegregation suit against the school district. The district court held that since the children were already receiving an integrated education, they lacked standing to sue and denied their motion for a preliminary injunction. This appeal followed.

The school district consisted of the city of Wilson and the surrounding area which was divided into 11 zones. The plaintiffs lived outside the city in zones three through nine. All white pupils in these zones were assigned to a previously all-black school, resulting in a 61 percent black majority in a district that was 46 percent black. The pupils in this suit charged that they were the only pupils in the school district assigned explicitly by race. They also contended that they were being denied equal protection of the laws because the school to which they were being assigned was not a part of a unitary school system but had been singled out for arbitrary mixing. The pupils argued that their educational opportunity was being decreased and that they were being forced to unfairly bear a burden which should be borne by the community at large.

The appellate court found it unnecessary to decide whether integration at some "tipping" point diminishes the quality of education to white pupils and thus imposes a unique burden on them. It was sufficient to determine, and the court so held, that the equal protection clause requires the disestablishment of a dual school system and replacement with a unitary one within which no one is excluded from any school because of race or color. Further, the white children in this case have an equal protection right to be assigned to school on the basis of some neutral principle applicable to all pupils in the system and not just to them. Therefore the court said these pupils need redress of "a personal, present right."

In denying the preliminary injunction the district court had held that there would be no irreparable damage to the pupils by virtue of their attendance at the public schools under the board's pupil assignment plan. The appellate court disagreed, saying that the pupils did have a sufficient personal interest in the controversy to have standing to bring the action.

The school board maintained that the plaintiffs had not exhausted their administrative remedies and that they were attempting to interfere with the board's discretionary authority. The appellate court held that the discretionary authority of the board of education does not extend to an unconstitutional plan of pupil assignment and that the pupils had every right to attack the plan. Concluding that the Wilson City School Board was not operating a unitary system, the court held that the pupils had standing to attack the defects in the over-all assignment plan despite the fact that they attended an integrated school. The judgment of the district court was reversed, and the case was remanded to that court with instructions that the school board be directed to submit a plan for the implementation of a unitary system no later than the 1970-71 school year.

Ohio

Deal v. Cincinnati Board of Education
419 F.2d 1387
United States Court of Appeals, Sixth Circuit,
December 9, 1969.

(See *Pupil's Day in Court: Review of 1967*, p. 34.)

Previous litigation involving a claim of de facto segregation in the Cincinnati school system had resulted in the district court decision that there was no constitutional duty on the part of the school board to bus children out of their neighborhoods and transfer classes for the sole purpose of alleviating racial imbalance resulting from racial concentrations in neighborhoods. The appellate court affirmed this ruling, but remanded the case for additional findings on the issue of claimed discrimination in specific schools and programs and claimed harm to black pupils. It was from these findings that the black pupils brought the present appeal.

The basic issue, as in the first appeal, was whether the school board had a constitutional duty to cross-bus children to racially balance the schools. The appellate court agreed with the district court, holding that the board did not have this duty. The appellate court noted that Cincinnati had long operated a nonracial, unitary school system where black as well as white children may attend in the district of their residence. There was "not *an iota* of evidence" where any child was denied admission to a school in the district of his home. Referring to its opinion in the first appeal, the court reiterated the benefits of a neighborhood school system.

The black pupils charged that housing patterns in the city were segregated as a result of actions of public and private agencies and it was up to the school board to remedy this fact. The appellate court disagreed, stating that the school board could hardly be blamed or held responsible for neighborhood housing patterns and whatever remedy existed should be invoked against the agencies which committed the alleged wrongs. The district court had found that specific schools and programs complained of had not been formulated to promote or perpetuate segregation and that school zone lines had not been gerrymandered to exclude blacks from certain schools. The appellate court agreed that the evidence supported the findings of the district court on the factual issue of discrimination and the finding that no harm resulted.

The plaintiffs had claimed that discrimination existed in the hiring and assigning of school personnel. The appellate court upheld the district court's finding that this was not true and that the school board was endeavoring to balance the faculty in the various schools. The appellate court also ruled that there was substantial evidence to support the finding that there was no inequality of educational facilities based upon racial classification of the pupils in the schools. The black pupils argued further that the school board sanctioned discrimination by industry in the Co-Op Training Program whereby pupils were trained by local industry and given jobs. The superintendent had testified that it was more difficult to place black pupils than white pupils, but that the board tried to place all pupils and refused to deal with industries that had been found to discriminate. On review of this evidence, the appellate court was of the opinion that the school board did not sanction discriminatory practices by local private industries in the administration of its Co-Op Program.

The appellate court concluded that the findings of the district court were supported by substantial evidence and were not clearly erroneous and that its conclusions of law were correct. Therefore, the district court judgment against the pupils was affirmed.

Oklahoma

United States v. Board of Education, Independent School District No. 1, Tulsa County, Oklahoma
429 F.2d 1253
United States Court of Appeals, Tenth Circuit,
July 28, 1970; rehearing denied September 8, 1970.

The United States brought a desegregation suit against the Tulsa school system, charging that the drawing of attendance zones, the administration of transfers, construction of new schools, and assignment of faculty constituted discrimination in violation of the Fourteenth Amendment. The district court dismissed the case, holding that none of the practices was unconstitutional either in conception or as administered. The district court found that the over-all policy of the school district was premised on a "neighborhood school attendance plan," and that even though this policy tended to perpetuate a high degree of racial imbalance, it resulted from impartial, good faith administration of the policy. The United States appealed.

The appellate court found that the black population of Tulsa was in a fairly well-defined compact area caused principally by discriminatory housing practices; that the schools constructed since 1955 also were built to serve a certain racial population. There were also inconsistencies in the neighborhood pattern with pupils not necessarily attending the school closest to their homes, and while the aim of the neighborhood plan was to avoid natural barriers, school attendance zones of six of the black schools were bisected by railroad tracks.

The appellate court also found that new schools had been constructed and additions made to existing schools in a manner that tended to perpetuate the dual identity of the school district, and that the district had maintained a minority to majority transfer program prior to this practice being ruled unconstitutional by judicial mandate. Currently the district allows transfers for "transportation" and "child care"; but an overwhelming majority of these transfers have been to schools where the pupils' race was in the majority. Further, the original faculty desegregation plan of the district, which would have placed teachers so that the percentages of black and white teachers in each school mirrored that of the entire district, had not been put into effect. Instead the present plan for faculty desegregation proposed to assign teachers so that one-third of the faculty at predominantly black schools would be white and remaining black teachers would be "equitably distributed" throughout the system.

In assessing the constitutional validity of the Tulsa neighborhood school plan, the lower court had placed great emphasis on the "good faith" of the school district, with no intent to foster racial discrimination and as a consequence held the neighborhood plan to be constitutionally valid. The appellate court said, however, that "before the 'good faith' of the school administrators becomes constitutionally relevant, it must first be shown that the neighborhood plan has evolved from racially neutral demographic and geographical considerations." In this case the appellate court found that the attendance zone lines as originally formulated were superimposed upon racially defined neighborhoods and were, therefore, discriminatory from their inception. Further, as currently administered, the Tulsa neighborhood school policy constituted a system of state-imposed and state-preserved segregation. Consequently, the school board had an affirmative duty to convert the school system to a unitary one and that this duty had not been met. The court said that the attendance zone lines had to be redrawn "so as to reduce and where reasonably possible to eliminate the racial identity of that group of students designated to attend any particular school." Similarly, the pattern of new school construction must be altered so as to affirmatively promote a unitary school system. Also, the original plan of the school district with respect to the faculty desegregation was ordered reinstated.

The decision of the district court dismissing the action was reversed and the case remanded to that court with directions that the school board come forward with a realistic plan for desegregation to begin immediately and that the district court retain jurisdiction over the case.

Tennessee

Hatton v. County Board of Education of Maury County, Tennessee
422 F.2d 457
United States Court of Appeals, Sixth Circuit,
February 26, 1970.

White parents sought to intervene in a suit brought by a discharged black teacher. The lower court denied the request to intervene and the parents appealed. The parents sought intervention to oppose a desegregation plan submitted by the county board of education in compliance with district court order.

The holding of the lower court denying intervention was affirmed. The appellate court concluded that there was no right of intervention in that the interests of the parents were being adequately represented by the school district. The court also denied permissive intervention, stating that it would unduly delay and prejudice the rights of the pupils who brought the desegregation suit.

Monroe v. Board of Commissioners of the City of Jackson, Tennessee
427 F.2d 1005
United States Court of Appeals, Sixth Circuit,
June 19, 1970.

(See *Pupil's Day in Court: Review of 1968*, p. 40; *Review of 1967*, p. 39.)

This case began in 1963 when black pupils sought relief from segregated schools in Jackson. In 1967, as part of the *Green* trilogy of cases, the Supreme Court of the United States reversed that portion of the appellate court opinion approving the free transfer provision of the desegregation plan of the board of education. The case was remanded to the district court for further proceedings designed to effectuate a plan for a unitary school system. On remand the district court ordered the free transfer provision stricken from the desegregation plan and the geographic zone lines redrawn to accomplish greater desegregation. That court also ordered the board to take further steps with regard to new school construction and faculty integration. The board of commissioners appealed.

On appeal the board conceded that it was interested primarily in reinstatement of the free transfer provisions. The appellate court concluded that the district court was correct in striking the free transfer provision from the board's revised plan. It pointed out that the Supreme Court had held the free transfer provision in this case was constitutionally impermissible and had held that "plainly *the plan* does not meet . . . [school officials'] affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.'" The appellate court, therefore, held that a free transfer provision was unacceptable as part of a desegregation plan for the Jackson schools.

Despite the language in the Supreme Court opinion, the board argued that it was entitled to retain the free transfer provision because of two "legitimate local problems" of the Jackson school system. The board first asserted that elimination of the provision would result in "white flight." The appellate court said that this argument has been presented and rejected before and, in fact, was presented to and rejected by the Supreme Court in this case.

Disruption in the processes of education and administration resulting from the integration of black and white pupils with widely varying academic achievement levels and socioeconomic backgrounds was the second "legitimate local problem" put forth as justification for retention of free transfer. This argument was also rejected as being without merit. The district court found and the appellate court agreed that greater not less integration of pupils with varying backgrounds is the answer to this problem of disparity of achievement levels.

The board also attacked the revised attendance zones prepared by the district court, arguing that the Supreme Court had not disturbed the original attendance zones as drawn, and that the civil rights act prohibited the court from ordering any change in the zones where the purpose is the assignment of pupils to achieve racial balance. The fundamental principal set forth in the *Green* trilogy was that local school boards have an affirmative duty to take whatever steps might be necessary to eliminate segregation and to convert to a unitary school system and that the only desegregation plan which is constitutionally acceptable is one that "promises realistically to work; and promises realistically to work *now*." The appellate court held that there was nothing in the record to disturb the district court determination that it was necessary to redraw the attendance zones to achieve a unitary school system. The appellate court also held that the provision of the civil rights act cited by the board did not prevent the district court from ordering relief since the provision was intended to neither enlarge nor limit the existing power of the court and was not intended to affect the power of the court to issue decrees to alleviate segregation.

The final issues pertained to the district court orders concerning new school construction and faculty desegregation. As to both, the board proposed merely to promise to build new schools and hire personnel on a nondiscriminatory basis. The appellate court held that the district court orders properly required affirmative action on the part of the board to desegregate the schools and the faculty. The judgment of the district court was affirmed in all respects.

Northcross v. Board of Education of the Memphis City Schools
90 S.Ct. 891
Supreme Court of the United States, March 9, 1970.

In 1968, black pupils sought to require the Memphis school board to adopt a specific school desegregation plan without a free transfer provision that was contained in a 1966 district court approved desegregation plan. The district court denied the motion, but directed the school board to file a revised plan which would incorporate the existing plan and would contain a modified transfer provision and other provisions including faculty desegregation. The board was also directed to file a map of proposed boundary changes and enrollment figures by race within the revised zones to enable the court to reconsider the adequacy of the transfer plan. The court found these steps to be necessary, for while the board acted in good faith, "the existing and proposed [supplemental] plans do not have real prospects for dismantling the state-imposed dual system at the 'earliest practicable date' . . . ." The plaintiffs then appealed to the Court of Appeals for the Sixth Circuit, seeking summary reversal. Following the Supreme Court decision in *Alexander v. Holmes County Board*, the plaintiffs again appealed to the Court of Appeals seeking to require the immediate adoption of a plan for a unitary school system. In denying both motions and remanding the case to the district court, the appellate court stated that action on its part would be premature until the district court had had an opportunity to rule on the ordered plan. The plaintiffs then sought an injunction to require the school board to file, in addition to the adjusted zone lines, a plan for a unitary system. This motion was denied by the Court of Appeals on the ground that the decision in *Alexander* was inapplicable to the present case since the appellate court was satisfied that Memphis was not operating a dual school system, and subject to compliance with the order of the district court, there would be a unitary school system (420 F.2d 546).

The black pupils appealed to the Supreme Court, seeking, with the assistance of HEW or the HEW-funded University of Tennessee Title IV Center, to require the preparation of a plan of complete pupil and faculty integration for the 1969-70 school year.

The Supreme Court held that the Court of Appeals had erred in substituting its own finding that the school system was not a dual system for the district court finding to the contrary since the latter decision was based upon substantial evidence. The Supreme Court also ruled that it was error for the appellate court to hold that *Alexander* was inapplicable to the case. The first order of remand was affirmed, but with the direction that the district court proceed promptly to consider the issues before it and to decide the case consistently with the decisions in *Alexander.*

Northcross v. Board of Education of the Memphis
City Schools
312 F.Supp. 1150
United States District Court, W.D. Tennessee, W.D.,
May 1, 1970.

(See case immediately above.)

Following remand from the Supreme Court, the district court considered the case in light of *Alexander*. The court construed this decision to mean that no child may be effectively excluded from a school because of race. The present policy of the board of education was geographic zoning with a free transfer provision, but with majority to minority transfer pupils having priority when there is a scarcity of space. The district court found that the school district had made boundary changes to increase integration when directed to do so by the court and that the boundary lines in the school district were not gerrymandered. The district court did not believe that previous court decisions required strict percentages in each school or that pairing of schools or bussing of pupils was constitutionally required.

The district court did conclude, however, that the free transfer provision did not meet the standards of a unitary system. Accordingly, this provision was altered to provide that no minority to majority transfers would be permitted unless the pupil's parent was employed by the school district in a school other than that to which the pupil was assigned. In that event the pupil could accompany his parent to the school where he is regularly assigned as an employee. The other exception was in the case of handicapped pupils in special education classes. The board was directed to announce its transfer policy to every pupil in writing as soon as possible.

With regard to faculty desegregation, the school district plan was to assign new faculty members and those requesting transfers to a school where their race was in the minority. The court had later modified that provision to provide that each school would have at least 20 percent minority faculty members. This was accomplished by the board. As of January 30, 1970, the total faculty distribution was 43 percent black and 57 percent white. In the present proceedings, the order of the court did not require set percentages, but did direct the school board to seek the assistance of the Title IV Educational Opportunities Planning Center at the University of Tennessee to have the Center investigate the problems of faculty desegregation and to make appropriate recommendations so that there would be more expeditious faculty desegregation for the 1970-71 school year.

Another issue before the court was that of new school construction. Very little proof was addressed to this issue, but in order to comply with *Alexander*, the court required that new schools, additions, and the use of portable classrooms be planned in furtherance of the board's affirmative duty to integrate the schools and that prior to any final commitment for site acquisitions or construction the court and the plaintiffs be notified.

The school district was directed to file with the court a further revised plan consistent with the opinion and including the racial makeup of each school, and maps that accurately reflect the existing zones for all schools. The court was of the opinion that when this plan was filed and approved, the school district would be operating in a unitary manner subject to evaluation in practice.

Texas

Singleton v. Jackson Municipal Separate School District
419 F.2d 1211
United States Court of Appeals, Fifth Circuit,
December 1, 1969.

Singleton v. Jackson Municipal Separate School District
Carter v. West Feliciana Parish School Board
90 S.Ct. 608
United States Supreme Court, January 14, 1970.

(See page 27.)

United States v. Board of Trustees of Crosby
Independent School District
424 F.2d 625
United States Court of Appeals, Fifth Circuit,
April 6, 1970.

The district court had approved a desegregation plan that permitted a delay in pupil desegregation until September 1970. This was in accordance with the Fifth Circuit Court of Appeals decision in *Singleton*. When *Singleton* was reversed by the United States Supreme Court, insofar as it authorized a delay in pupil desegregation beyond February 1, 1970, the Government moved to amend the plan accordingly. The United States appealed from the denial of that motion. The school board cross-appealed, contending that the plan approved by the district court ordered "bussing" in violation of the 1964 Civil Rights Act.

The appellate court held that the district court denial of the Government motion to amend the order was incorrect. However, so little was left of the 1969-70 school year that the court said that nothing could be accomplished by ordering implementation of the plan at this date. The court disapproved of the action of the district court, but declined to disturb the school system before the conclusion of the current school term.

With regard to the cross-appeal of the school district, the court noted that transportation was currently used in the school system and the pairing of schools required under the plan would involve only changes in present practices. The plan required of the school system only that it use transportation facilities along with all other facilities to achieve a unitary system. The court did not believe that this involved the 1964 Civil Rights Act.

The school district was directed to put the approved plan into operation no later than June 1, 1970, and apply it to any summer schools which would be conducted. The case was reversed and remanded to the district court for further proceedings.

Virginia

Bradley v. School Board of the City of Richmond, Virginia
315 F.Supp. 325
United States District Court, E.D. Virginia,
Richmond Division, June 20, 1970.

Black pupils sought a preliminary injunction pending litigation to restrain the Richmond school board from proceeding with any new school construction. The city had been awarded certain territory formerly belonging to Chesterfield County. This increased the pupil population of Richmond and required additional schools. Three new elementary schools were planned to accommodate the increased population. All would be located on the periphery of the city-county line and would be predominantly white. The sites for these schools had already been acquired. Additional schools were also planned in the annexed area, but

Since the Richmond school system was admittedly being operated in a manner contrary to constitutional requirements in that it was not a unitary system, the court ruled that no new school construction could be undertaken at this time. The court believed that any precipitous action at this time might well result in perpetuation of a segregated system. A preliminary injunction was issued, suspending all construction except for renovation under way at two high schools until such time as a school desegregation plan was approved by the court.

Nesbit v. Statesville City Board of Education
418 F.2d 1040
United States Court of Appeals, Fourth Circuit,
December 2, 1969.

(See page 41.)

Wright v. County School Board of Greensville County, Virginia
309 F.Supp. 671
United States District Court, E.D. Virginia,
Richmond Division, March 2, 1970.

(See *Pupil's Day in Court: Review of 1967*, p. 31.)

A school desegregation plan had been worked out by the court for Greensville County including the city of Emporia. The plan was to become effective for the 1969-70 school year and involved utilizing different schools for different grades. Children residing in Emporia attended schools operated by the county. In the summer of 1969 the city of Emporia sought to establish a separate school system for the city alone. The racial balance would then have been about 75 percent black to 25 percent white in the county and about half and half in the city.

A temporary restraining order was issued, enjoining the taking of any steps that would impede implementation of the outstanding desegregation order. When this case came to trial, all pupils were attending the county system.

The desegregation order was directed to "the defendants herein, their successors, agents, and employees." Since at the time this order was issued, there was a city board of education but no city school system, the order was directed to the city board of education which was still covered by the order. The court felt that if the city were allowed to set up a separate school system, there would be a possible adverse impact on the effort to provide a unitary system for the entire county. The proposed change was not approved by the court.

However, the court did say that if Emporia desired to operate a quality school system for city pupils, it might be able to do so if it presented a plan that did not have as great an impact on the rest of the area.

NOTE: Following reversal by the United States Court of Appeals, Fourth Circuit, an appeal was filed in the Supreme Court of the United States. (sub nom. *Wright v. Emporia City Council*, 39 *U. S. Law Week* 3542, June 8, 1971.)

Citations to Other School Desegregation Decisions

Listed below are 72 school desegregation cases grouped under six major topic headings. Within each heading the cases are arranged alphabetically by state.

1. The following cases involved federal district court decisions disapproving desegregation plans. Some of the school districts were ordered to adopt the plan presented by the U. S. Department of Health, Education, and Welfare, and others directed to present a new plan. In some instances the district court fashioned its own plan.

Alabama

Lee v. Macon County Board of Education, 317 F.Supp. 95, United States District Court, M.D. Alabama, E.D., June 12, 1970.

Arkansas

Cato v. Parham, 316 F.Supp. 678, United States District Court, E.D. Arkansas, Pine Bluff Division, September 15, 1970.

Florida

Pate v. Dade County Board of Education, 315 F.Supp. 1161, United States District Court, S.D. Florida, Miami Division, June 26, 1970. Certiorari denied, 91 S.Ct. 1613, May 3, 1971.

Louisiana

Conely v. Lake Charles School Board, 314 F.Supp. 1282, United States District Court, W.D. Louisiana, Lake Charles Division, June 11, 1970.

Valley v. Rapides Parish School Board, 313 F.Supp. 1193, United States District Court, W.D. Louisiana, Alexandria Division, June 5, 1970.

Tennessee

Kelley v. Metropolitan County Board of Education, 317 F.Supp. 980, United States District Court, M.D. Tennessee, Nashville Division, July 16, 1970.

Virginia

Bradley v. School Board of the City of Richmond, Virginia, 317 F.Supp. 555, United States District Court, E.D. Virginia, Richmond Division, August 17, 1970.

Green v. School Board of the City of Roanoke, 316 F.Supp. 6, United States District Court, W.D. Virginia, Roanoke Division, August 11, 1970.

2. The following cases are those where school desegregation plans were approved by the respective district courts as meeting constitutional standards.

Alabama

United States v. Choctaw County Board of Education, 310 F.Supp. 804, United States District Court, S.D. Alabama, S.D., August 8, 1969.

Louisiana

Gordon v. Jefferson Davis Parish School Board, 315 F.Supp. 901, United States District Court, W.D. Louisiana, Lake Charles Division, June 8, 1970.

Texas

Ross v. Eckels, 317 F.Supp. 512, United States District Court, S.D. Texas, Houston Division, May 30, 1970.

United States v. Lubbock Independent School District, 316 F.Supp. 1310, United States District Court, N.D. Texas, Lubbock Division, August 25, 1970.

United States v. Tatum Independent School District, 306 F.Supp. 285, United States District Court, E.D. Texas, Tyler Division, September 13, 1969.

3. The following cases were reversed and remanded by federal appellate courts because the desegregation plans approved by the district courts did not meet constitutional standards. In many of the Fifth Circuit Court of Appeals decisions the district courts were directed to reconsider the cases in light of the December 1, 1969, appellate court decision in *Singleton v. Jackson Municipal Separate School District*, setting out a model decree for the school districts in the Fifth Circuit. In other of these cases the school districts were directed to adopt the proposed plan of the U. S. Department of Health, Education, and Welfare or to consult that department to formulate a desegregation plan. Some of the cases decided in 1969 prior to the *Singleton* decision were remanded in light of the 1968 Supreme Court decision in *Green v. County School Board of New Kent County* (88 S.Ct. 1689).

Alabama

Boykins v. Fairfield Board of Education, 429 F.2d 1234, United States Court of Appeals, Fifth Circuit, July 10, 1970.

Choctaw County Board of Education v. United States, 417 F.2d 845, United States Court of Appeals, Fifth Circuit, June 26, 1969.

United States v. Choctaw County Board of Education, 417 F.2d 838, United States Court of Appeals, Fifth Circuit, June 26, 1969.

United States v. Jefferson County Board of Education, 417 F.2d 834, United States Court of Appeals, Fifth Circuit, June 26, 1969.

Arkansas

Clark v. Board of Education of Little Rock School District, 426 F.2d 1035, United States Court of Appeals, Eighth Circuit, May 13, 1970. Certiorari denied, 91 S.Ct. 1608, May 3, 1971.

Kemp v. Beasley, 423 F.2d 851, United States Court of Appeals, Eighth Circuit, March 17, 1970.

Florida

Bradley v. Board of Public Instruction of Pinellas County, Florida, 431 F.2d 1377, United States Court of Appeals, Fifth Circuit, July 28, 1970. Certiorari denied, 91 S.Ct. 1608, May 3, 1971.

Frank v. Braddock, 420 F.2d 690, United States Court of Appeals, Fifth Circuit, December 12, 1969.

Mannings v. Board of Public Instruction of Hillsborough County, Florida, 427 F.2d 874, United States Court of Appeals, Fifth Circuit, May 11, 1970; rehearing denied June 2, 1970.

Steele v. Board of Public Instruction of Leon County, Florida, 421 F.2d 1382, United States Court of Appeals, Fifth Circuit, December 12, 1969.

Youngblood v. Board of Public Instruction of Bay County, Florida, 430 F.2d 625, United States Court of Appeals, Fifth Circuit, July 24, 1970; rehearing denied September 11, 1970. Certiorari denied, 91 S.Ct. 1610, May 3, 1971.

Georgia

Acree v. County Board of Education of Richmond County, Georgia, 429 F.2d 387, United States Court of Appeals, Fifth Circuit, July 15, 1970.

Bivins v. Bibb County Board of Education, 424 F.2d 97, United States Court of Appeals, Fifth Circuit, February 5, 1970.

Hilson v. Ouzts, 424 F.2d 219, United States Court of Appeals, Fifth Circuit, April 3, 1970.

Hilson v. Ouzts, 431 F.2d 955, United States Court of Appeals, Fifth Circuit, August 20, 1970.

United States v. Board of Education of Baldwin County, Georgia, 417 F.2d 848, United States Court of Appeals, Fifth Circuit, July 9, 1969.

United States v. Board of Education of Baldwin County, Georgia, 432 F.2d 1013, United States Court of Appeals, Fifth Circuit, March 9, 1970.

United States v. Board of Education of Webster County, Georgia, 431 F.2d 59, United States Court of Appeals, Fifth Circuit, July 7, 1970.

Louisiana

Banks v. Claiborne Parish School Board, 425 F.2d 1040, United States Court of Appeals, Fifth Circuit, April 15, 1970.

Banks v. Claiborne Parish School Board, 431 F.2d 951, United States Court of Appeals, Fifth Circuit, August 21, 1970.

Charles v. Ascension Parish School Board, 421 F.2d 656, United States Court of Appeals, Fifth Circuit, December 11, 1969.

Hall v. St. Helena Parish School Board, 417 F.2d 801, United States Court of Appeals, Fifth Circuit, June 30, 1969. Certiorari denied, 90 S.Ct. 218, November 10, 1969.

Hall v. St. Helena Parish School Board, 424 F.2d 320, United States Court of Appeals, Fifth Circuit, March 17, 1970.

Jenkins v. City of Bogalusa School Board, 421 F.2d 1339, United States Court of Appeals, Fifth Circuit, December 12, 1969.

Jones v. Caddo Parish School Board, 421 F.2d 313, United States Court of Appeals, Fifth Circuit, January 6, 1970.

Lemon v. Bossier Parish School Board, 421 F.2d 121, United States Court of Appeals, Fifth Circuit, December 12, 1969.

Taylor v. Ouachita Parish School Board, 424 F.2d 324, United States Court of Appeals, Fifth Circuit, April 13, 1970.

United States v. East Carroll Parish School Board, 425 F.2d 230, United States Court of Appeals, Fifth Circuit, December 9, 1969.

Williams v. Iberville Parish School Board, 421 F.2d 161, United States Court of Appeals, Fifth Circuit, December 12, 1969.

Williams v. Kimbrough, 421 F.2d 1351, United States Court of Appeals, Fifth Circuit, December 10, 1969.

Mississippi

Harris v. Oktibbeha County School District, 420 F.2d 948, United States Court of Appeals, Fifth Circuit, December 11, 1969.

United States v. Greenwood Municipal Separate School District, 422 F.2d 1250, United States Court of Appeals, Fifth Circuit, January 8, 1970.

United States v. Hinds County School Board, 417 F.2d 853, United States Court of Appeals, Fifth Circuit, July 3, 1969; rehearing denied October 9, 1969. Certiorari denied, 90 S.Ct. 612, January 14, 1970.

United States v. Hinds County School Board, 423 F.2d 1264, United States Court of Appeals, Fifth Circuit, November 7, 1969.

United States v. Tunica County School District, 421 F.2d 1236, United States Court of Appeals, Fifth Circuit, January 6, 1970. Certiorari denied, 90 S.Ct. 1871, June 8, 1970.

South Carolina

Stanley v. Darlington County School District, 424 F.2d 195, United States Court of Appeals, Fourth Circuit, January 19, 1970. Certiorari denied, 90 S.Ct. 1499, April 27, 1970.

Texas

United States v. Mathews, 430 F.2d 1272, United States Court of Appeals, Fifth Circuit, August 21, 1970.

Virginia

United States v. School Board of Franklin City, 428 F.2d 373, United States Court of Appeals, Fourth Circuit, June 11, 1970.

4. The cases that follow involve desegregation plans that were either approved in full or with some modification by the appellate courts.

Alabama

Brown v. Board of Education of the City of Bessemer, 432 F.2d 21, United States Court of Appeals, Fifth Circuit, August 28, 1970; rehearing denied September 28, 1970.

Carr v. Montgomery County Board of Education, 429 F.2d 382, United States Court of Appeals, Fifth Circuit, June 29, 1970.

Lee v. City of Troy Board of Education, 432 F.2d 819, United States Court of Appeals, Fifth Circuit, August 24, 1970.

Lee v. Macon County Board of Education, 429 F.2d 1218, United States Court of Appeals, Fifth Circuit, July 15, 1970.

Florida

Allen v. Board of Public Instruction of Broward County, 432 F.2d 362, United States Court of Appeals, Fifth Circuit, August 18, 1970; rehearing denied and rehearing en Banc denied September 24, 1970. Certiorari denied, 91 S.Ct. 1609, May 3, 1971.

Mays v. Board of Public Instruction of Sarasota County, Florida, 428 F.2d 809, United States Court of Appeals, Fifth Circuit, June 8, 1970.

Tilman v. Board of Public Instruction of Volusia County, Florida, 430 F.2d 309, United States Court of Appeals, Fifth Circuit, July 21, 1970.

Wright v. Board of Public Instruction of Alachua County, Florida, 431 F.2d 1200, United States Court of Appeals, Fifth Circuit, August 4, 1970; rehearing denied September 3, 1970.

Georgia

Hightower v. West, 430 F.2d 552, United States Court of Appeals, Fifth Circuit, July 14, 1970; rehearing denied September 11, 1970.

Louisiana

Moses v. Washington Parish School Board, 421 F.2d 685, United States Court of Appeals, Fifth Circuit, January 28, 1970.

Mississippi

Henry v. Clarksdale Municipal Separate School District 425 F.2d 698, United States Court of Appeals, Fifth Circuit, April 15, 1970.

North Carolina

Chambers v. Iredell County Board of Education, 423 F.2d 613, United States Court of Appeals, Fourth Circuit, February 27, 1970.

Oklahoma

Dowell v. Board of Education of the Oklahoma City Public Schools, 430 F.2d 865, United States Court of Appeals, Tenth Circuit, July 29, 1970.

South Carolina

Brunson v. Board of Trustees of School District No. 1 of Clarendon County, South Carolina, 429 F.2d 820, United States Court of Appeals, Fourth Circuit, June 5, 1970.

Tennessee

Robinson v. Shelby County Board of Education, 429 F.2d 11, United States Court of Appeals, Sixth Circuit, June 25, 1970.

5. The following cases were remanded to the district courts for a determination as to whether the neighborhood school assignments of the school board satisfied the "strict proximity" guidelines set out in the Court of Appeals for the Fifth Circuit decision in *Ellis v. Board of Public Instruction of Orange County, Florida* (page 21).

Georgia

Calhoun v. Cook, 430 F.2d 1174, United States Court of Appeals, Fifth Circuit, July 8, 1970.

Louisiana

Andrews v. City of Monroe, 425 F.2d 1017, United States Court of Appeals, Fifth Circuit, April 23, 1970.

Mississippi

Edwards v. Greenville Municipal Separate School District, 431 F.2d 365, United States Court of Appeals, Fifth Circuit, August 5, 1970.

6. The cases that follow involve questions of timing of desegregation plans under the decision of the Supreme Court of the United States in *Alexander v. Holmes County* (90 S.Ct. 29 (1969)).

Arkansas

McKisick v. Forrest City Special School District No. 7, 427 F.2d 331, United States Court of Appeals, Eighth Circuit, June 5, 1970.

Willingham v. Pine Bluff, Arkansas, School District No. 3, 425 F.2d 121, United States Court of Appeals, Eighth Circuit, April 29, 1970.

North Carolina

Nesbit v. Statesville City Board of Education, 418 F.2d 1040, United States Court of Appeals, Fourth Circuit, December 2, 1969.

STUDENT DISCIPLINE

Dress and Appearance

Case Digests

Because of the volume of cases and repetition of issues, the cases on student dress and appearance are reported on a selective basis. Following are the digests of 20 cases under this topic. Beginning on page 50 are 22 cases reported by name and citation only. All involve school board or school regulation of male hairstyles.

Alabama

Griffin v. Tatum
425 F.2d 201
United States Court of Appeals, Fifth Circuit,
April 20, 1970.

(See *Pupil's Day in Court: Review of 1969*, p. 47)

A high-school principal and assistant principal appealed from a district court order directing them to reinstate a student who had been suspended for violation of a hairstyle regulation. The regulation in question provided that "hair must be trimmed and well cut. No Beatle haircuts, long sideburns, ducktails, etc. will be permitted." The school officials had interpreted this regulation to the students as meaning sideburns no longer than the middle of the ear, hair one inch above the eyebrows and hair in back tapered rather than blocked. The suspended student in this case had hair that conformed in all respects except that it was blocked rather than tapered.

The student did not attack the over-all regulation, only the portion that required him to have his hair tapered. The district court concluded that the application of the rule to the student constituted an arbitrary and unreasonable application to the extent that it violated the equal protection and due process clauses of the Fourteenth Amendment. The district court then went further and struck the entire regulation.

The appellate court affirmed the lower court ruling to the extent that it struck the requirement that hair be blocked, for this was the only portion of the regulation being challenged. However, the action of the district court in striking the entire regulation was reversed. The appellate court said that school authorities did have the right to establish rules and regulations in the interest of good management of the schools, and this included reasonable regulations concerning hairstyles. The court stated that the "touchstone for sustaining such regulations is the demonstration that they are necessary to alleviate interference with the educational process." The district court had held that the authorities had failed to justify the hairstyle rule. However, the appellate court found undisputed evidence "that the wearing of long hair by boys was a disruptive influence in the school."

Arkansas

Carter v. Hodges
317 F.Supp. 89
United States District Court, W.D. Arkansas,
Fort Smith Division, September 22, 1970.

A 20-year-old high-school student brought suit against the Fort Smith school board, seeking declaratory and injunctive relief relative to the school dress code. The student had been suspended for violation of the hair length provision of the school dress code, and subsequently expelled for assaulting the dean of men when informed of his suspension. The student contended that his rights under the First and Fourteenth Amendments were violated.

At the court hearing the school authorities introduced testimony to the effect that the dress code was reasonable and had an effective relationship to the educational process at the high school.

The court noted that the student was over the age of compulsory school attendance, but that he had the right to attend school by complying with reasonable regulations of the board. The question then was whether the dress code was a reasonable regulation having an effective relationship to the educational process. The court held that the school had met its burden of proof in this regard.

The relief requested by the student was denied.

Corley v. Danhauer
312 F.Supp. 811
United States District Court, E.D. Arkansas, E.D.,
May 8, 1970.

A junior high-school student brought suit against the band director of his school, the school principal, and school officials of the Little Rock school district. At issue was the constitutionality of the school district policy which required students who wished to participate in the school band program to conform their hair length and styling to the requirements of the band director, subject to the approval of the principal, and which provided that a student who refused to do so might be excluded from the band.

The student in this case had been a member of the band, still attended practice and classes but was not permitted to participate in public band performances until he cut his hair. The student maintained that he wore his hair long in protest against continued United States participation in the war in Vietnam. His position was that schools have no right to regulate the length of hair of a band student, particularly when the student's hair represents a protest against a political, social, or economic evil.

The school officials took the position that the regulation was reasonable, and necessary for the discipline, good order, and success of the band, especially since the band is judged on appearance as well as performance.

The court found no evidence that the school was attempting to prevent the student from protesting against the war or that it was attempting to punish him for his protest. The authorities simply believed that members of the school band ought to conform to generally accepted norms as to hair length and styling, or else leave the band. Both parties cited the *Tinker* case to support their respective positions. While not analyzing that case in detail, the court noted that the case did recognize that school officials have broad discretion in running the schools and in controlling student life. On the other hand, students have the constitutional right of expression of opinion which may not be prohibited by school authorities absent a showing that such prohibition is necessary to avoid substantial interference with school discipline or with the rights of other students. The court said that reasonable restrictions on students are permissible if they are rationally related to a legitimate educational objective and if not arbitrary.

Applying the foregoing principles to the instant case, the court found and concluded that the Little Rock school system had a right to require students who desired to participate in the school band program to conform their hair length to reasonable requirements of the band director and that this requirement extends to students who depart from the normal standards as a method of social protest. Further, this requirement did not deprive these students of any federally protected constitutional right. The complaint of the student was accordingly dismissed.

California

Neuhaus v. Torrey
310 F.Supp. 192
United States District Court, N.D. California,
March 10, 1970.

High-school athletes sought a preliminary injunction against school officials to prevent their enforcement of a grooming code applicable only to members of athletic teams. The students admitted that they were in violation of the portion of the code relating to permissible length of hair. The question before the court was whether the school officials had met the burden of justifying the rule on a rational and reasonable basis.

The testimony of the coaches indicated that long hair could adversely affect performance in certain track events and could interfere with the performance of swimmers, gymnasts, wrestlers, and basketball players. The court observed that the rule did not appear to be discipline for the sake of discipline nor did it appear to be an arbitrary or capricious decision.

The court held that under the total circumstances of the case, the application of the grooming rule was not of constitutional proportions. Nor was there a reasonable probability that the students would succeed in a trial on the merits. The motion for preliminary injunction was accordingly denied.

Colorado

Hernandez v. School District No. 1, Denver, Colorado
315 F.Supp. 289
United States District Court, D. Colorado,
August 18, 1970.

Suspended Mexican-American high-school students brought suit against the school district, seeking a declaration that their constitutional rights were violated. Approximately one month before the suspensions the students had asked permission of the high-school principal to wear long hair and black berets to school as a symbol of their culture. The principal permitted the students to do so, saying that "we would try and see if we could live with it." Additionally the students were permitted to celebrate Independence Day of the Republic of Mexico by having a walk-out of students to participate in a parade and demonstration. Shortly after the wearing of the berets began and especially after the celebration, the students engaged in conduct which disrupted the school, its educational processes, and discipline.

The undisputed testimony of the principal was that the students were arrogant and boisterous, and were attempting to have their own way about things in school. There was evidence that the beret was used by the students as a symbol of their power to disrupt the conduct of the school and their exercise of control over the student body. Both Mexican students who did not wear the berets and non-Mexican students were in fear of the beret wearers.

Because the beret had become a symbol of disruption in the school, the principal told the students that they would have to stop wearing them at school or be suspended. Previous to this, efforts had been made to induce the students to change their conduct. Finally the principal was forced to suspend the students for five days. This suspension was continued by the school superintendent for an additional 10 days or until the students removed their berets.

The first question facing the court was whether the suspension of the students for wearing black berets violated their First Amendment rights to free expression. Relying on *Tinker*, the students claimed that their berets were a political symbol and that to ban them was a violation of their right to free speech. The court pointed out, however, that the opinion in *Tinker* specifically permitted limitations on the students' right to free speech when their conduct materially disrupted class work or involved substantial disorder or invasion of the rights of others. The court ruled that the disruptive conduct in this case did not enjoy constitutional protection.

The students then argued that a school regulation requiring approval by the principal before leaflets could be distributed was an improper restraint on their First Amendment rights and made their suspension unlawful. The court said the validity or invalidity of this regulation was not an issue in this case. Violation of the regulation was not the reason for their suspension, and in fact they were not prevented by anyone from distributing any literature. The suspension resulted from the refusal of the students to obey the order to stop wearing the berets and the students could be readmitted at any time that they agreed to comply.

The final contention of the students was that they were denied procedural due process because they were not given a hearing prior to their suspensions. The court found this contention to be without merit in that Colorado law permits temporary suspensions by the principal and extension of the suspensions by the superintendent as was done in this case, and provides for a hearing before expulsion. The students were not expelled. The court concluded that the statutory procedures for temporary suspension and their application in this case did not deprive the suspended students of procedural due process.

The court concluded that the complaint of the students was without merit and should be dismissed.

Connecticut

Crossen v. Fatsi
309 F.Supp. 114
United States District Court, D. Connecticut,
February 16, 1970.

A high-school student was suspended for violation of the school dress code because he grew a mustache and beard. The regulation that he was accused of violating provided: "Students are to be neatly dressed and groomed, maintaining standards of modesty and good taste conducive to an educational atmosphere. It is expected that clothing and grooming not be of an extreme style and fashion." The student contended that his beard and mustache were not prohibited under the code because he did not consider them to be extreme styles or fashions, and if they are so construed, the code violates his constitutional right to privacy and freedom of expression.

The court held that the wording of the code in stating what is expected of a student is unconstitutionally vague and overbroad. "It leaves to the arbitrary whim of the school principal, what in fact constitutes extreme fashion or style in the matter of personal grooming and permits his own subjective opinion to be the sole measure of censorship." The court held that the existing rule was too imprecise to be enforceable, since its purpose limits and invades the student's right of privacy protected by the Ninth and Fourteenth Amendments. However, the court expressly stated that the school board does have the authority to formally adopt a standard of grooming for high-school students; such a code must clearly define standards and should be reasonably designed to avoid classroom disruption, prevent disturbances among students, and avoid distraction in the classroom.

The court ordered the student reinstated, any notation of the suspension expunged from his record, and enjoined the school officials from suspending or disciplining him for any violation of the present code.

Illinois

Miller v. Gillis
315 F.Supp. 94
United States District Court, N.D. Illinois, E.D.,
September 25, 1969.

A high-school student and his parents brought suit against the board of education of School District No. 224 in Lake County, Illinois, seeking to compel the board to admit the student to high school and to prevent it from subsequently suspending or expelling him. The student was refused admission to the high school because his hair was longer than permitted by the provision of the dress code dealing with male hairstyles. The student asserted that his rights under the First, Fourth, Ninth, and Fourteenth Amendments were violated. The student was attending classes under a temporary restraining order pending the outcome of this suit.

In defense of the dress code the superintendent asserted that "extreme styles" in clothing and personal appearance would be disruptive of classes. The only example of disruption was one incident in the cafeteria caused by an argument over the possible outcome of this case. There was also testimony to the effect that many teachers would be in violation of the code if it were applied to them.

The court disagreed with the argument of the student that his First Amendment rights were violated since he did not contend that he wore his hair long as a symbol. Rather, his hairstyle was a matter of personal preference. Nor did the court find any violation of the student's rights under the Fourth and Ninth Amendments. However, the court agreed with the student that his Fourteenth Amendment rights were abridged. The court held that the regulation in question constituted a denial of equal protection. The court could not believe that "regulations which strictly and admittedly conservatively, lay out severe and unduly restrictive limits of dress and personal appearance bear any rational relationship to the orderly conduct of the educative process." It must be clearly shown, the court said, that the particular style of dress and appearance would in fact actually be disruptive, and the evidence in this case was clearly to the contrary. The court held that the one incident of disruption at which the student in this case was not even present, was insufficient to show that the regulations were necessary to prevent disruption in the schools. Finally, the court felt that it was quite arbitrary to operate on the basis that students with long hair would be disruptive when at the same time faculty members with equally long or longer hair were not to be disciplined or suspended or made to conform to the school code.

The section of the dress code restricting male hair length was declared unconstitutional, and the school board was enjoined from enforcing it. The board was also directed to expunge any evidence of the disciplinary action taken against the student.

Iowa

Sims v. Colfax Community School District
307 F.Supp. 485
United States District Court, S.D. Iowa,
Central Division, January 16, 1970.

A female high-school student brought an action against the school district to enjoin its enforcement of a hair length regulation requiring that hair be kept one finger width above the eyebrows clear across the forehead. The girl had been suspended from school for violation of this regulation. By stipulation between the parties pending the outcome of this suit, the student voluntarily complied and was readmitted to school. The question presented to the court was whether the regulation violated the student's constitutional rights.

The court noted that it is well-established that the state has an interest in maintaining an educational system but that school officials may not act autocratically nor are they vested with absolute authority over the students. It must, therefore, be determined, the court said, if the regulation in question is reasonable after weighing the interests of both parties.

A number of the previous school hair decisions involving male students had held that a hairstyle rule could be upheld "only upon a showing of compelling reasons for so doing or upon a showing that if the forbidden conduct is allowed there would be a material and substantial interference to the educational system." It was not pleaded in this case, and the court did not decide whether the student's personal selection of hairstyle was protected by the First Amendment. The court found that regardless of the applicability of the First Amendment, a student's free choice of appearance is constitutionally protected under the due process clause.

The justification for the regulation put forth by the school system was that it promoted good citizenship by teaching respect for authority and instilling discipline. The court said that it could not accept this argument "as a sufficient rationale to endow this rule herein with the necessary constitutional requisite of reasonableness." The only other reason offered by the school district was that the typing instructor was unable to see the girl's eyes during the class, and that this observation was necessary in teaching proper typing methods. The typing teacher testified that she could not remember how long the girl's hair was at the time in question, nor was any evidence presented that the girl was told that this was the reason for her suspension. The court was totally unconvinced that such a problem actually existed in this case. The incident in the typing class was the only evidence of any disruption to the school system by the violation of the hair length regulation.

The court concluded that the rule in question unnecessarily and unreasonably circumscribed the student's constitutional rights under the Fourteenth Amendment. A judgment was entered, declaring the rule unconstitutional, forbidding its further enforcement, and ordering any reference to the suspension expunged from the student's record.

Maine

Farrell v. Smith
310 F.Supp. 732
United States District Court, D. Maine, S.D.,
March 18, 1970.

Three long-haired, bearded students were threatened with expulsion from Southern Maine Vocational Technical Institute (SMVTI) because of their violation of student dress and grooming requirements. They sought a declaration that the requirements were unconstitutional. At the time of the hearing all three had shaved and had cut their hair so as to be in conformity with the regulation, but they stated that they desired to grow their hair to a length that would be in violation of the rules.

The publicly supported institution is a post-secondary technical school that provides "salable skills" for service in industry. Representatives of industry recruit prospective employees on campus each year, and a large number of the graduates go directly into industrial employment upon graduation. The dress code had been developed as a result of joint faculty-student-administration deliberations. School officials testified that the restrictions on sideburns, long hair, and beards resulted from the opinion of the persons who developed the code, that student appearance was a significant factor in creating job opportunities, and that good grooming enhances the image of the school and the students among prospective employers recruiting on campus. There was also testimony that a relaxation of the grooming code would adversely affect the earning prospects of the student body as a whole.

The sole issue before the court was whether the SMVTI hair code as applied to the three students unconstitutionally infringed upon their rights. The court concluded that it did not. The court accepted the view that the right to grow a beard or wear long hair is an aspect of personal liberty protected by the Constitution. While it is recognized that this student right exists and is protected from state infringement by the Fourteenth Amendment, school authorities are entitled to make and enforce reasonable regulations for maintaining an effective school system.

Under the circumstances of this case, the court was satisfied that the school authorities met the substantial burden of justifying the regulations. In view of the school's interest in advancing the economic welfare of its students, the court held that the grooming regulations were reasonably calculated to further this interest. The relief requested by the students was denied, and their complaint was dismissed.

New Hampshire

Bannister v. Paradis
316 F.Supp. 185
United States District Court, D. New Hampshire,
September 10, 1970.

A sixth-grade pupil sued officials of the Pittsfield school district challenging a regulation banning dungarees from school. The pupil had worn neat and clean dungarees to school twice. There was no evidence that the wearing of them had caused any disturbance in the school or given rise to any disciplinary problem. Nor did the wearing of them constitute a danger to the health or safety of other pupils.

The school principal testified that proper dress is a part of a good educational climate, and that if pupils wore working or play clothes to school, it would lead to a relaxed attitude which would detract from discipline.

The court first considered whether the pupil had presented a cause of action. The court could find no cases brought under the Federal Civil Rights Act involving apparel of pupils. Nor was there any suggestion in this case that a right of free expression was involved. The court found that the First Amendment, therefore, did not apply here. However, the court was convinced by the language and reasoning in *Richards v. Thurston* (page 50 of this report) "that a person's right to wear clothes of his own choosing provided that, in the case of a schoolboy, they are neat and clean, is a constitutional right protected and guaranteed by the Fourteenth Amendment." Therefore, the pupil had a right to wear clean dungarees to school, unless the school could justify exclusion of them. Since there was no evidence of any kind that dungarees disrupted the educational process, the court ruled that the school officials had not justified their intrusion on the personal liberty of the pupil, small as that intrusion might be, and that the prohibition against the wearing of dungarees was unconstitutional and invalid. The school board and the principal were enjoined from enforcing that portion of the dress code against wearing of dungarees.

New York

Scott v. Board of Education, Union Free School District No. 17, Hicksville
305 N.Y.S. 2d 601
Supreme Court of New York, Special Term,
Nassau County, Part I, November 18, 1969.

A high-school girl challenged the school district dress code, a portion of which prohibited female students from wearing slacks except when permitted by the principal on petition of the student council when warranted by cold or inclement weather.

The student wore slacks to school twice and was placed in detention both times, thereby missing her classes. She informed the board of her objections to the dress code and also of the fact that she and her family were on public assistance and could not afford clothing that conformed to the regulations. The board agreed to consider procedures for hardship cases. In her suit, the girl asked that the board be enjoined from enforcing the dress code and from placing her on detention for wearing slacks to school, and be directed to revoke the code.

The court found nothing in the New York education law that dealt explicitly with dress, but under the law it is the duty of the board to protect its students against injury as well as to maintain order and discipline in the schools. Therefore, the court held that the board had the implied power to regulate dress for these reasons. However, the court said that "a regulation which bears no reasonable relation to safety, order or discipline is beyond its authority." The flat prohibition of all slacks did not relate to an area within the board's authorized concern. That provision of the dress code was therefore declared invalid.

Ohio

Guzick v. Drebus
431 F.2d 594
United States Court of Appeals, Sixth Circuit,
September 16, 1970.

Certiorari denied, 91 S.Ct. 941, March 1, 1971.

This action for injunctive relief was brought by an East Cleveland high-school student who appeared in school wearing a button advertising an anti-war demonstration and was suspended until he returned to school without it. The trial court denied relief (305 F.Supp. 472 (1969)) and the student appealed. The high school had a long-standing rule prohibiting students from wearing buttons, emblems, or other insignia on school property during school hours unless they were related to a school activity.

The student asserted that he had a constitutional right to wear the button. He cited *Tinker v. Des Moines Community School District* (89 S.Ct. 733, 1969) in support of his argument. In distinguishing this case from *Tinker*, the appellate court noted that the rule against the buttons was of long standing and that the high school was racially tense. Although there had been no serious disruptions in the school routine, there was a serious discipline problem. The wearing of buttons to school had previously resulted in fights and disruptions. In making its own examination of the record the appellate court agreed with the district court conclusion that "if all buttons were permitted at Shaw High, many students would seek to wear buttons conveying an inflammatory or provocative message or which would be considered as an insult or affront to certain of the other students . . . . These buttons would add to the already incendiary situation and would undoubtedly provoke further fighting among the students and lead to a material and substantial disruption of the educational process at Shaw High." The district court additionally found that any rule which permitted the wearing of some buttons, but not all, would cause similar disruptions of the educational process and would be impossible to administer.

The appellate court concluded that the case was distinguishable on the facts from the *Tinker* case and that the facts in this instance supported the wisdom of the no-symbol rule. The judgment of the district court dismissing the action of the student and upholding the school regulation was affirmed.

NOTE: The Supreme Court of the United States declined to hear an appeal in this case.

Oklahoma

Christmas v. El Reno Board of Education, Independent School District No. 34
313 F.Supp. 618
United States District Court, W.D. Oklahoma,
June 4, 1970.

A high-school senior sought injunctive and declaratory relief charging violation of his civil and constitutional rights when the school district refused to allow him to participate in a "diploma ceremony" because of the length of his hair. A school district regulation barred participation in this ceremony as well as other extracurricular activities to students whose hair covered their ears, eyes, or collar. Prior to the diploma ceremony, the student had received his official certificate of graduation and transcript in exactly the same form and bearing the same date as every other student in the graduating class. In this school district the diploma was an unofficial document presented in a post-graduate ceremony attended by students on an optional basis. For at least eight years prior to this suit the school district had maintained and enforced a policy with regard to the length of hair of students who participated in this ceremony and extracurricular activites.

At the beginning of his senior year and several times during the year the student and his parents were informed that the student would not be allowed to participate in the ceremony unless his hair was cut to conform to the regulation. The boy had met with the superintendent and the school board, and both upheld the regulation. At no time was any disciplinary action taken against the boy nor was he refused admission to classes.

The student testified that he had had fights on numerous occasions with other students who objected to the length of his hair and admitted that his participation in the ceremony would be a disruptive element and might cause trouble or a disturbance.

The court found that the school officials had been more than reasonable and fair with the student in all respects and that they had justified the validity and reasonableness of the regulation, and accordingly had met their substantial burden of justification. The student had not been deprived of any educational opportunities or of his right to express his opinions symbolically, orally, or in writing, and had been afforded all regular standard procedural and substantive due process rights to which he was entitled.

The court concluded that the student had no constitutional right to attend an elective post-graduate ceremony without first complying with the reasonable dress and grooming established for the ceremony. The request for an injunction was denied.

Pennsylvania

Lovelace v. Leechburg Area School District
310 F.Supp. 579
United States District Court, W.D. Pennsylvania,
March 17, 1970.

A black high-school student was suspended for violation of the school district's "proper dress" regulation. The boy had hair on his upper lip contrary to the rule providing that "beards and mustaches are not acceptable for male students." The student brought suit to compel his readmission to school.

The alleged mustache was barely perceptible, and according to the testimony of the boy and his parents represented natural growth and had not been cultivated. The boy had never shaved or trimmed the mustache.

The first claim of the student was that the code was being administered so as to make him a victim of racial discrimination. The court found that the dress code had been administered without regard to race and that both black and white male students had been required to be clean-shaven. The next contention of the student was that he was being deprived of his constitutional rights by the enforcement of the dress code. The court found that the regulation against beards and mustaches was reasonable, rational, and a legitimate function of public education. However, because the growth present on the student was practically imperceptible and natural rather than a cultivated adornment, the court held that the student had not violated the code. "To exclude him from school for such a non-violation is arbitrary, and a violation of due process." Accordingly, the student was ordered readmitted to school.

Texas

Aguirre v. Tahoka Independent School District
311 F.Supp. 664
United States District Court, N.D. Texas,
Lubbock Division, March 11, 1970.

Five Mexican-American junior high-school students sought a temporary injunction against enforcement of a school district regulation that prohibited students from wearing "apparel decoration that is disruptive, distracting, or provocative." The apparel involved was brown armbands that the children were wearing to school to express support for attempts to change certain of the school system policies and practices. On the first day that the armbands were worn, the contested regulation did not exist. The regulation was promulgated the following day and a procedure approved under which students who violated the new regulation could be temporarily suspended from school. As of the date the case was heard 17 students had been suspended for violation of the regulation.

A few incidents of disruption allegedly caused by the armbands were offered in evidence by the school board to support the adoption of the regulation. However, the court found as a fact that there was no showing that the wearing of the armbands by the students "would materially and substantially interfere with the requirements of appropriate discipline or be disruptive of normal education functions." The court also found that the instant case was on all points similar to *Tinker v. Des Moines Community School District* (89 S.Ct. 733 (1969)). The court concluded that the controlling law from *Tinker* and applicable here was that "the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment."

The court concluded that under *Tinker* the wearing of the armbands was constitutionally protected activity in the absence of a showing that it materially and substantially interfered with the operation of the school district. Since there was no finding that would justify the prohibition of the armbands under this rule, the court granted the temporary injunctive relief sought by the students pending final determination of the case.

Butts v. Dallas Independent School District
306 F.Supp. 488
United States District Court, N.D. Texas,
Dallas Division, December 5, 1969.

Six students of Dallas high schools sought to enjoin the school district and the superintendent from enforcing a policy of prohibiting the wearing of black armbands in the Dallas schools. Before the court in the instant proceedings was a motion for a preliminary injunction.

The school district had a long-standing policy against the wearing of any attire of a disruptive nature in school. On October 15, 1969, when students at the various Dallas high schools showed up wearing black armbands, the superintendent determined that the armbands were disruptive and asked that they be removed. Some students complied; those who did not were asked to leave school until such time as they removed the armbands.

In their action against the school district the students relied on *Tinker v. Des Moines Community School District* (89 S.Ct. 733 (1969)). In that case the Supreme Court of the United States upheld the right of students to wear black armbands in protest of the Vietnam war. The district court in this case, however, found that the two cases could be differentiated on the facts. It quoted from *Tinker* (with emphasis added) that "the wearing of the armbands *in the circumstances of this case* was entirely divorced from *actually or potentially disruptive* conduct by those participating in it." In the instant case, the district court found on the testimony presented by school officials that the wearing of the armbands on a day that had been designated "national moratorium day" by various groups around the country could lead to disruptive conduct. It was noted that there had been demonstrations at some Dallas high schools in conjunction with the moratorium day. As to the circumstances in the Dallas school district the court said that "unlike the situation in *Tinker*, the school authorities were very concerned about disruption and had reason to anticipate problems if armbands were worn." The court also distinguished this case from the *Tinker* case in that in the latter case the school authorities enforced the regulation because they were opposed to the "principle of the demonstration itself." There was no evidence at all that the Dallas school authorities were opposed to the principle involved, the court said. Rather, the record overwhelmingly supported the conclusion that the purpose of the armband ban was to prevent disruption in the school during the school day.

The motion of the students for a preliminary injunction was denied.

Schwartz v. Galveston Independent School District
309 F.Supp. 1034
United States District Court, S.D. Texas,
Galveston Division, February 2, 1970.

A high-school student sought injunctive relief against his threatened suspension from school for violation of the dress code with regard to the length of his hair. The regulation provided that "boys must keep their hair clean, combed and out of the eyes, and neatly cut." The school officials testified that the rule was deliberately vague to allow students some freedom of expression and administrators some flexibility in enforcement. The student had been told by the assistant principal and the superintendent that his hair exceeded the length that was permissible. He appealed to the school board which found the regulation valid and declined to set aside the superintendent's ruling that the student was in violation of the regulation. This suit was then filed.

The student claimed that by attempting to regulate his hair length, the school officials violated his constitutional rights. In response, the school officials denied that the regulation violated any constitutional right and asked that his complaint be dismissed for failure to exhaust available state remedies.

The court first determined that it had jurisdiction over the parties and the subject matter. Considered next was the contention of the school officials that the student had not exhausted his administrative and judicial remedies prior to filing suit in federal court. This raised two questions: first, whether exhaustion of such remedies may ever be required; and second, whether the applicable state remedies were adequate and available. The court found first that the federal statute under which jurisdiction was conferred was not adopted to supersede state laws affording remedies for dereliction by state officials. Rather, the federal statute was enacted to provide a remedy "only where one either did not exist or for some reason an existing remedy was unenforced or otherwise insufficient." Therefore, the student could be required to exhaust his state remedies if the remedies were adequate.

The available state remedy was an appeal of the board of education decision to the state commissioner of education and then to the state board of education. If the student was still not satisfied with the relief, he could sue in state district court and then follow normal judicial appellate procedure. Additionally, if the case involved no questions of fact, suit could be brought directly in state court.

The court therefore held that the state remedies available to the student were adequate and were not supplanted by federal law, and that the student could not pursue his claim for relief in federal court. The court reasoned that no federal interest would be served by allowing the student to disregard state procedure, and that education was a matter of great state concern and would be best left to the state and to the state courts to handle. The injunctive relief sought by the student was denied and his complaint was dismissed.

Whitsell v. Pampa Independent School District
316 F.Supp. 852
United States District Court, N.D. Texas,
Amarillo Division, September 8, 1970.

A high-school student sought injunctive relief against his effective expulsion from school because of the length of his hair. The student was not actually expelled, but school officials conceded that they would not permit him to attend school until his hair was cut in compliance with the school dress code.

Until the beginning of the spring 1970 semester the school system had a dress code that had been in effect for some years. At that time owing to some opposition from students and others, the code was repealed and no code was enforced for that semester. An administrator for the system testified that there was a noticeable increase in disruption and disciplinary problems for the semester and it was his opinion that this increased lack of discipline and breakdown in proper behavior was directly related to and caused by the lack of an effective dress code. There was no claim that the student-plaintiff had been directly involved in any of the trouble or that he was a disciplinary problem.

During the summer of 1970 the board of trustees of the school district formulated the present dress code after the question had been studied by the administrative and teaching staff and after the students had expressed their views. With regard to male hair length, the code provided that hair not protrude over the eyes, ears, or shirt collar, and that it be kept neatly combed.

The court noted that high-school students have constitutionally protected rights, among them the wearing of long hair. However, the court said, "If the facts and circumstances of a particular case show that there exists a valid and overriding governmental interest the student's Constitutional rights must become subordinate to such interests."

In this instance the court was of the opinion that there was a connection between the disruptive influences of the previous spring and the failure to have a dress code. The court held that this experience properly led the school officials to the conclusion that such a code was necessary to educate the students, to efficiently operate the school system, and to promote discipline. Finding that the code was reasonably adopted and that it was enforced fairly, the court denied the student the requested injunctive relief.

Vermont

Dunham v. Pulsifer
312 F.Supp. 411
United States District Court, D. Vermont,
May 5, 1970.

Brattleboro high-school officials adopted regulations applicable only to students participating in interscholastic athletic competition, one portion of which related to permissible hair length of male student athletes. As a result of the enforcement of this code, six players were dropped from the tennis team for their violation of the hair length provision. Three of these students brought suit, contending that the enforcement of the athletic code deprived them of their right to equal protection under the Fourteenth Amendment. The question before the court was whether the school board had sustained its burden of justifying the regulation. No evidence was introduced to support the regulation except uniformity of appearance and discipline for its own sake.

To support an argument of a denial of equal protection, the court said, there must be a classification which is the creature of state action and the classification must be unjustified under an applicable standard of review. The court found that the classification in this case denied access to positions on athletic teams to those students whose hair did not conform to the code. The court said that this denial of access to tax-supported programs to one group while granting it to another could not be accomplished without justification and is subject to examination under the light of the equal protection clause. The court held that the regulation did constitute state action within this clause.

Next to be considered was which of the two standards of review was to be applied to the classification. The traditional standard upholds a classification if it is not arbitrary and has a reasonable connection with some permissible legislative purpose. The other standard, the active review, holds that if a classification not only creates differential treatment but serves to penalize the exercise of a fundamental right, it must be justified by a compelling governmental interest. In determining which standards of review applied, the court considered the nature of the right threatened by the hair code. The court concluded that the right to wear one's hair as one pleased was a substantial and fundamental right under the Constitution that the state could not infringe upon without carrying a substantial burden of justification. Since a basic right was involved, the second standard of review was applicable. It was therefore up to the school district to show not only that the regulations were reasonable but that they also served some compelling state interest.

The court found that the justifications put forth by the district failed to meet this burden. No evidence was presented to show that a player's performance was affected by his hair length, nor was it shown that long hair on an athletic team creates dissension on the team. In fact, the court found that the team was free from dissension prior to the exclusion of the plaintiffs from participation. Discipline as justification for the rule was also rejected. The court said that while the coach must have reasonable control of the members of the team, obedience to a rule unrelated to performance and participation may not be demanded of the players. At the court hearing, the school district stressed conformity and uniformity as reasons for the regulation, but the court said that, standing alone, these could be neither reasons nor justifications for the code.

The court held that the grooming code was unconstitutional. The school district was directed to reinstate the students as members of the tennis team and was enjoined from enforcing the grooming code against them.

Wisconsin

Breen v. Kahl
419 F.2d 1034
United States Court of Appeals, Seventh Circuit,
December 3, 1969.

Certiorari denied, 90 S.Ct. 1836, June 1, 1970.

(See *Pupil's Day in Court: Review of 1969*, p. 50.)

Two high-school students who were expelled from Williams Bay, Wisconsin, high school for violation of the school-board hair length regulation brought suit seeking reinstatement. One had been readmitted to school after he cut his hair to conform to the regulation but at the time of the trial again wished to grow his hair to a length in violation of the regulation. The lower court declared the regulation unconstitutional and ordered the boys reinstated. The school board appealed.

The appellate court said at the outset that the right to wear one's hair at any length or in any desired manner is "an ingredient of personal freedom protected by the United States Constitution." This court held that whether this right is designated as within the "penumbras" of the First Amendment guarantee of freedom of speech or as encompassed within the Ninth Amendment as an additional fundamental right, this right clearly exists and is applicable to the states through the due process clause of the Fourteenth Amendment.

As justification for the regulation the school board had asserted that male students with long hair distract other students from their school work and students whose appearance conforms to community standards perform better in school. The district court found on the record that there was no showing that these attempted justifications were sufficient to uphold the regulation. The appellate court agreed.

The school board also argued that regardless of the lack of justifications for the regulation, it should be upheld so that the disciplinary powers of the school authorities would not be diminished. The appellate court rejected this argument, saying that to "uphold arbitrary school rules which 'sharply implicate basic constitutional values' for the sake of some nebulous concept of school discipline is contrary to the principle that we are a government of laws which are passed pursuant to the United States Constitution." The argument of *in loco parentis* which was presented by the school board was also found deficient by the court since the students had their parents' permission to wear their hair in a length prohibited by the school board. The judgment of the lower court was therefore affirmed.

NOTE: The Supreme Court of the United States declined to hear an appeal from this decision.

Citations to Other Dress and Appearance Cases

The following cases are all instances where the relief sought by the students was granted on the ground that there is a constitutional right to wear one's hair as one pleases and the school board had not met its burden of justifying the regulation banning long hair, mustaches, or beards. The cases are arranged alphabetically by state.

California

King v. Saddleback Junior College District, 318 F.Supp. 89, United States District Court, C.D. California, July 17, 1970.

Connecticut

Yoo v. Moynihan, 262 A.2d 814, Superior Court of Connecticut, Hartford County, December 16, 1969.

Illinois

Laine v. Dittman, 259 N.E.2d 824, Appellate Court of Illinois, Second District, June 22, 1970.

Massachusetts

Richards v. Thurston, 424 F.2d 1281, United States Court of Appeals, First Circuit, April 28, 1970.

Minnesota

Westley v. Rossi, 305 F.Supp. 706, United States District Court, D. Minnesota, Fifth Division, October 9, 1969.

Nebraska

Black v. Cothren, 316 F.Supp. 468, United States District Court, D. Nebraska, August 6, 1970.

Reichenberg v. Nelson, 310 F.Supp. 248, United States District Court, D. Nebraska, March 10, 1970.

Texas

Calbillo v. San Jacinto Junior College, 305 F.Supp. 857, United States District Court, S.D. Texas, Houston Division, November 17, 1969.

Wisconsin

Cash v. Hoch, 309 F.Supp. 346, United States District Court, W.D. Wisconsin, January 6, 1970.

In the cases listed below, school-board or individual school regulations against long hair, beards, or mustaches were upheld by the courts. The regulations in all cases were found to be reasonable. In some instances the courts found justification for the regulations because of disruption or fear of disruption to the educational process caused by students with long hair. Other courts said that no proof of disruption was necessary to justify the regulation. The courts that considered the constitutional question held that no constitutional right to wear long hair existed.

Colorado

Brick v. Board of Education, School District No. 1, Denver, Colorado, 305 F.Supp. 1316, United States District Court, D. Colorado, November 7, 1969.

Florida

Canney v. Board of Public Instruction of Alachua County, 231 So.2d 34, District Court of Appeal of Florida, First District, January 27, 1970; rehearing denied February 24, 1970.

Georgia

Stevenson v. Wheeler County Board of Education, 426 F.2d 1154, United States Court of Appeals, Fifth Circuit, May 26, 1970. Certiorari denied, 91 S.Ct. 355, December 14, 1970.

Illinois

Livingston v. Swanquist, 314 F.Supp. 1, United States District Court, N.D. Illinois, E.D., June 9, 1970.

Mississippi

Shows v. Freeman, 230 So.2d 63, Supreme Court of Mississippi, December 22, 1969.

Missouri

Bishop v. Colaw, 316 F.Supp. 445, United States District Court, E.D. Missouri, E.D., July 24, 1970.

Giangreco v. Center School District, 313 F.Supp. 776, United States District Court, W.D. Missouri, W.D., September 25, 1969.

Ohio

Gfell v. Rickelman, 313 F.Supp. 364, United States District Court, N.D. Ohio, E.D., April 28, 1970.

Tennessee

Brownlee v. Bradley County, Tennessee Board of Education, 311 F.Supp. 1360, United States District Court, E.D. Tennessee, S.D., April 10, 1970.

Jackson v. Dorrier, 424 F.2d 213, United States Court of Appeals, Sixth Circuit, April 6, 1970. Certiorari denied, 91 S.Ct. 55, October 12, 1970.

Texas

Pritchard v. Spring Branch Independent School District, 308 F.Supp. 570, United States District Court, S.D. Texas, Houston Division, January 22, 1970.

Southern v. Board of Trustees for the Dallas Independent School District, 318 F.Supp. 355, United States District Court, N.D. Texas, Dallas Division, October 6, 1970.

Wood v. Alamo Heights Independent School District, 308 F.Supp. 551, United States District Court, W.D. Texas, San Antonio Division, January 27, 1970.

Protests and Demonstrations

California

Hatter v. Los Angeles City High School District
310 F.Supp. 1309
United States District Court, C.D. California,
March 12, 1970.

Two high-school girls brought a civil rights action alleging that the school district infringed upon their constitutional rights of free speech and due process. Both girls were unhappy with provisions of the school dress code and sought to bring about its modification by organizing a boycott of the school's annual candy sale. In furtherance of the boycott one of the girls passed out leaflets across the street from school urging other students to join the boycott. This was in violation of a school district rule requiring all matter distributed or exhibited on school property to be authorized by a member of the administration. For this activity she was suspended for a short period of time. The other girl wore a tag on her dress during school urging students to boycott chocolates. She alleged that the tag was ripped from her dress and she was threatened with suspension if she wore it again.

At the time that this case was heard on the matter of issuance of a preliminary injunction, the suspended student was back in school, the chocolate drive was over, and the dress code had been modified, although not completely to the students' satisfaction. Therefore, it appeared to the court that the case was moot. However, the students saw a threat of future disciplinary measures which they stated had a chilling effect on their constitutional right of free expression and asked for a declaration of their rights.

The court found that there was no allegation of a present threat of any specific act that the court could rule on, nor was there any likelihood that the students would ultimately prevail since the complaint set forth no course of action cognizable in the court. For these reasons the court held that a preliminary injunction should be denied.

In weighing the importance of maintaining administrative authority to regulate and discipline students against the personal rights of the two students to stir up the candy drive boycott to protest the dress code, the court found that the students raised no question of constitutional proportions. Nor did the court find that the suspended student had been denied due process. The complaint of the students was dismissed.

Siegel v. Regents of the University of California
308 F.Supp. 832
United States District Court, N.D. California,
January 19, 1970.

In these proceedings the president-elect of the student government at the University of California at Berkeley moved the court to convene a three-judge federal court and to issue a preliminary injunction against the university to bar any disciplinary action being taken against him. University officials counter-moved to dismiss the action. The proposed disciplinary action against the student arose from a speech that he made before a large gathering of students on campus in which he urged the students to "go down there and take the park." This referred to what has become known as "Peoples Park," a piece of university-owned property which previously had been forcibily seized and occupied by persons not acting under the direction of the university. Subsequently, the property was fenced by the university. Immediately after the speech several thousand people proceeded to the park where they were met by law enforcement officials. Violence ensued and as a result within the next few days, there occurred one death, numerous injuries, and many arrests.

Several days after his speech, the student was informed by letter that he was charged with violating university regulations by his actions and advised that a hearing would be held. Both a preliminary hearing and a hearing were held, at both of which the student was represented by counsel. After much evidence had been taken at the hearing, the Committee on Student Conduct found that the actions of the student violated university regulations and that his speech inflamed an already tense situation. The Committee recommended that he be placed on disciplinary probation, including exclusion from all extracurricular activities and specifically from serving as president of the student government.

The student contended that the university regulations were constitutionally invalid in that they were overbroad and vague restrictions on the right of free speech. It was on this ground that the student asked that a three-judge court be convened. The requirement of a three-judge court was not applicable unless it was determined by the district court that the constitutional issues were substantial.

The court said that it is well settled that "even speech or expression, which materially and substantially intrudes upon the work of the school by interfering with the requirements of appropriate discipline in its operation, may be prohibited." The regulations in question were directed at student conduct and not at speech. The court said that nothing in the regulations could be construed as having a "chilling effect" on the student's First Amendment rights of free speech or expression because of vagueness, overbreadth, or otherwise. The words used by the student and the circumstances under which they were uttered negated any argument of protected conduct. The student was not expressing opinion but engaging in "*conduct*—a distinct, affirmative *verbal act*—overt conduct for which plaintiff could be properly called to account under the regulations whatever might be his claim as to his subjective purpose and intent."

The student cited numerous cases to support his position but the court did not find them applicable. The action here was not the silent expression of ideas as in *Tinker v. Des Moines Independent Community School District* (89 S.Ct. 733 (1969)). The court concluded that the constitutional issues raised by the student were insubstantial and that no three-judge court was required.

The court also ruled that the student was not denied due process as he claimed. Accordingly the motion for a preliminary injunction was denied.

Colorado

Hernandez v. School District No. 1, Denver, Colorado
315 F.Supp. 289
United States District Court, D. Colorado,
August 18, 1970.

(See page 43.)

Florida

Banks v. Board of Public Instruction of Dade County
314 F.Supp. 285
United States District Court, D. Florida,
June 26, 1970. Judgment vacated, 91 S.Ct. 1223,
March 29, 1971.

A hearing on three consolidated cases was held before a three-judge federal court. The cases all involved the common question of the Florida statute providing for suspension of public-school pupils and the validity of a Dade County regulation enacted pursuant to the statute.

Andrew Banks, a high-school senior had been suspended for refusal to stand during the salute to the Flag. Robin Mobley, a junior high-school student, had been suspended for being in an adjacent elementary school during school hours without permission, contrary to school rules. Another junior high-school student, Michael Hill, had been suspended for possession of marbles, again contrary to school rules.

The first question before the court was the propriety of the class action brought by Banks and Mobley challenging the statute and the regulation pertaining to suspensions. The court concluded that the complaints failed to show the existence of a question of law or fact common to the class of persons subject to the statute and regulation since the reasons for which students may be lawfully suspended "are limited only by the varieties of misbehavior which their ingenuity can devise." Additionally, Banks brought a class action challenging the constitutionality of the regulation pertaining to the Flag salute. This the court found to be a proper subject for a class action.

The next question was the facial constitutionality of the statute that provided that a principal could suspend a pupil for willful disobedience, open defiance of authority, use of profane and obscene language, other serious misconduct, or repeated misconduct of a less serious nature. The statute provided further that each suspension with reasons shall be reported immediately in writing to the parent and to county superintendent. The students asserted that this statute was unconstitutional on its face as being vague, overbroad, and indefinite and for failure to provide for prior notice and a hearing so as to comport with procedural due process.

The court found no merit in this assertion, saying that while the language of the statute was broad, the rules of conduct contained therein were not so vague as to require the court to declare them invalid. Although not all of the statutory language to which the students objected was couched in specific prohibitions, it was obvious to the court that the many and varying types of misconduct which justified suspension were incapable of exact description and, therefore, necessitated the use of encompassing words.

The students in all three cases also alleged that the statute and the regulation were unconstitutional as violative of due process in that they did not provide for prior notice or a hearing of the charges. The court noted that the statute did provide that the parents be notified of the suspension and the reasons therefor. In addition, the form used by the school district to inform the parents carries an invitation to the parents to discuss the matter with the school. The students contended that a hearing must be held prior to the suspension. The court disagreed, stating that granting the students a hearing prior to suspension would result in a disruption of the educational process which cannot be permitted. In reaching this conclusion the court was attempting to balance the rights of the students against the rights of the school district. The court held that the procedures for immediate notice to the parents and for the right of hearing upon request of the parents, after the fact, while somewhat informal when contrasted with criminal procedures, was consistent with the dictates of due process when examined in the light of the public-school setting.

The last contention of the three students was that the regulations and the statute were unconstitutionally applied to them. The court found no evidence of this in that all three were suspended in accordance with the procedure already found constitutional and that all three had violated school regulations of which they were fully aware.

The last issue considered by the court involved the student who had been suspended for his refusal to stand during the pledge to the Flag in violation of a regulation which provided that "students who for religious or other deep personal conviction, do not participate in the salute and pledge of allegiance to the flag will stand quietly." The student asserted that he had a constitutional right to refuse to stand and that he had been disciplined for the exercise of his constitutional rights of free speech and expression. The school district denied that the student's refusal to stand was an exercise of his rights and asserted that there was a compelling governmental purpose to be served by requiring students to stand during the pledge.

The court held that the refusal of the student to stand during the pledge did constitute an expression of his religious beliefs and political opinions and that his refusal to stand was no less a form of expression than was the wearing of the black arm bands in the *Tinker* case. In the words of the court, "He was exercising a right 'akin to free speech.'" The student had testified that his refusal to stand was based on his religious beliefs as a Unitarian and a simple protest against black repression in the United States. The unrefuted testimony in the case, the court said, had shown that the refusal of the student to stand had caused no disruption in the educational process. The First Amendment guaranteed to the student his right to claim that his objection to standing during the Flag ceremony was based on religious and political beliefs. The regulation required him to communicate, by standing, his acceptance of and respect for all that for which our Flag is but a symbol. The court said that the right to differ and express one's opinion to fully vent his First Amendment rights, even to the extent of showing disrespect for the Flag by refusing to stand and recite the pledge of allegiance cannot be suppressed by the imposition of suspension. Therefore, the court concluded that the regulation was in direct conflict with the free speech and expression guarantee of the First Amendment and was unconstitutional.

NOTE: On appeal, the Supreme Court of the United States vacated the judgment and remanded the case.

Black Students of North Fort Myers JR.–SR. High School ex rel. Shoemaker v. Williams
317 F.Supp. 1211
United States District Court, M.D. Florida,
Tampa Division, September 29, 1970.

High-school students who staged a walkout at North Fort Myers high school brought a class action seeking to bar enforcement of a school-board policy which automatically suspended students who walked out of class. The students claimed their constitutional rights were violated because they were suspended without a hearing in violation of the due process clause of the Fourteenth Amendment and they were suspended for exercising their First Amendment rights.

The suspension policy had been established by the school board in December 1968 following two incidents of students leaving school. Thereafter in February 1970, over 100 black students staged a walkout to voice grievances. The parties to the suit could not agree as to the nature of the grievances or as to whether the walkout was peaceful although the school board minutes reflected that the "group was orderly and well-behaved." That evening the school board and the superintendent met in a special meeting and decided to suspend for 10 days the students who left school; however, they would be permitted to return to school after one week if they appeared at school with their parents. Following this decision a form letter was sent to each student's parents setting forth the terms of the suspension and the reasons for it.

The school officials admitted that the students were suspended without a prior hearing. Despite this, the school board maintained that the students should not be granted summary judgment because there were contested facts concerning the nature of the misconduct and there was a factual dispute as to whether the principal who suspended the students actually saw them commit the misconduct.

The court held that the nature of the walkout was immaterial to the due process issue. The fact that the principal saw the students walk out would not have any bearing on the fact that the students were still entitled to a hearing. Guilt or innocence of the students was not at issue, the court said. Rather, the question was whether they were punished in accordance with the constitutional standard of justice, "in short, whether they were punished before they were legally determined guilty."

The court cited the law in the Fifth Circuit that due process at tax-supported institutions requires notice and some opportunity for an adversary hearing. The court concluded that due process prevents school officials from "suspending a student for a substantial period of time without first affording the student an adversary hearing. A suspension for ten days is a suspension for a substantial period of time." The court therefore granted the students' motion for summary judgment, ordered the officials to expunge from the students' records all mention of the suspension, and enjoined the officials from suspending students for a substantial period of time without notice of charges, offer of a hearing at which the students are given an opportunity to defend themselves, and imposition of sanctions only on the basis of substantial evidence.

Lieberman v. Marshall
236 So.2d 120
Supreme Court of Florida, May 28, 1970;
rehearing denied June 26, 1970.

Members of a local chapter of Students for a Democratic Society (SDS) appealed after a lower court denied their motion to dissolve a preliminary injunction which barred them from holding any meeting or rally in any buildings on the campus of Florida State University. The preliminary injunction had been granted the university without a hearing and without notice to SDS. The purpose had been to prevent without university permission an intended occupation of a building that night by SDS, which was denied official recognition as a campus group. When the injunction was served on the group, the occupation had already started.

Two primary questions were presented by the students in their effort to have the injunction lifted. The first involved the sufficiency of the injunction at the time that it was issued; the second concerned the constitutional rights of the students who were barred from meeting on campus. The argument relating to the injunction centered on the fact that it was issued without notice to the students and without giving them an opportunity to be heard. Florida law provides that a temporary injunction should not be issued except after notice to the adverse party unless injury will be done if an immediate remedy is not afforded. To justify the issuance of the injunction without notice it must appear that the time required to give notice of a hearing would actually permit the threatened injury to occur. In this instance the court found that the threat of injury was immediate and in fact the occupation of the building had begun when the order was served. Nor did the court think that the university was under an obligation to apply for the injunction at an earlier date. It was held that the university had shown that irreparable injury would result if an immediate injunction were not issued. Therefore, the injunction was properly issued, and it was necessary that the students obey it unless their actions enjoyed constitutional protection. In discussing that issue the court noted that the SDS was not barred from holding meetings and demonstrations; it was merely restrained from unlawfully occupying and unauthorizedly using any university building.

The students then contended that their right to free speech was unconstitutionally infringed upon by the injunction. The court observed that other campus groups were permitted to use university facilities for meetings, if they were officially recognized. The court held that the university was under no obligation to allow student groups to use its facilities but once it did so, it could not close the buildings to any students in violation of their constitutional rights. Without deciding whether any student group could use campus buildings without permission, the court found that the denial of campus recognition to SDS was valid. The rights of the students must be balanced against the right of the university to maintain order and respect for fair rules, and its need to pursue educational goals without disturbance. The court found that this balancing resulted in favor of the university, and the activities of SDS and its members fell beyond the limits of protected speech.

The lower court order denying the SDS motion to dissolve the preliminary injunction was affirmed.

Missouri

Jones v. Snead
431 F.2d 1115
United States Court of Appeals, Eighth Circuit,
October 1, 1970.

Five students at Forest Park Community College were suspended by the college president for their disruptive behavior on campus on Moratorium Day, October 15, 1969. Later that month, following the pressing of formal written charges of specific acts of disorderly conduct and a hearing, three of the students were suspended for the remainder of the semester and the other two students were reinstated. All of the students filed suit in district court, seeking injunctive and declaratory relief against the administrators of the junior college for violation of their students' civil rights. They sought a preliminary injunction for reinstatement of the still suspended students and other relief. The district court denied the motion and the students appealed.

At the district court hearing it was adduced that the students had actively engaged in disruptive behavior and that the college had observed rudimentary principles of due process in affording the students written notice of the charges and a hearing. On appeal, the students contended that the hearing and decision-making procedures violated their right to due process and that the college regulations governing student conduct were void for vagueness and overbreadth.

These arguments, resting on a partial record in the court below, failed to persuade the appellate court that the preliminary order of the district court should be reversed. First, the appellate court said, if it is determined that the college hearing violated due process, the students would be entitled to a new hearing, not reinstatement. The court was of the opinion that "appellate resolution of the issues raised by the students requires a complete record in the trial court including findings of fact and a final judgment on the merits." On the present partial record available to the appellate court, lacking a transcript of the college hearing, the court could not conclude that the college arrived at its decision by unreasonable or unfair processes. Finding no abuse of discretion or error of law by the district court, the appellate court affirmed its order denying preliminary relief.

New York

Board of Higher Education of the City of New York v. Marcus
311 N.Y.S.2d 579
Supreme Court of New York, Special Term,
Kings County, Part I, May 28, 1970.

Brooklyn College had been granted a temporary restraining order against disruptive student activity on the campus. This case involved a motion by the college for a preliminary injunction against the students and a cross-motion by the students to vacate the temporary order previously granted and to order that a hearing be held and evidence be taken. The temporary order was granted after students had occupied offices on campus, caused considerable damage, and otherwise disrupted the normal activities of the school. Following the issuance of that order the occupation ended.

One of the factors to be considered by a court in granting a preliminary injunction is irreparable injury to the party seeking the injunction. The students maintained that the college could not show irreparable harm because the unlawful occupation had ended. The court, however, was not convinced that the unlawful acts would not continue and be repeated. Additionally, the college stated that it suffered financial loss to property and loss of time of employees, including professional teaching hours. The court said that this loss of time could not be readily calculated and this made the injury irreparable since it could not be adequately compensated by damages.

The students also contended that the injunction should be denied because the college had failed to meet and negotiate with the students and had not first made a good faith attempt to solve genuine and long-standing problems within its own college community. The court rejected this argument, noting that there was no law requiring a college to negotiate with students.

The students sought to vacate the temporary restraining order on the additional grounds that they were not afforded an adversary hearing on the injunction. The court found that the circumstances here of unlawful occupation, violence, violation of the rights of others, and the irreparable injuries to the college warranted the issuance of the temporary restraining order.

The court continued the temporary order in effect with a modification that permitted peaceful protest, demonstration, and assembly on campus by the students. The cross-motion of the students was denied except for this modification.

Board of Higher Education of the City of
New York v. Rubain
310 N.Y.S.2d 972
Supreme Court of New York, Special Term,
Bronx County, Part I, May 11, 1970.

The board of higher education sought to enjoin student activity that had resulted in campus disruption and the blockade of some buildings. The board alleged that the students named as defendants in this action incited and encouraged this activity. A show cause order and a temporary stay had dispersed some of the activity, but demonstrations of a disruptive nature continued.

The students did not deny the conduct but instead alleged that the temporary stay was too broad in scope; that the board failed to show irreparable injury; that the cessation of classes resulted from a student boycott because of an announced increase in tuition, not disruption. and that the students who wished to attend class could have been accommodated in another building that was not blockaded. The students also asserted that the faculty adopted a motion urging the college president to drop the suit.

The court found these reasons insufficient to rebut the board's demonstrated need for relief. The right of the students to engage in dissent is counterbalanced by the right of other students to pursue uninterrupted studies. The court concluded that the complaint of the board should not be dismissed and should be scheduled for an immediate hearing. The preliminary stay was continued in effect except that the students were granted the right to peaceably demonstrate.

DeVito v. McMurray
311 N.Y.S.2d 617
Supreme Court of New York, Special Term,
Queens County, Part I, May 21, 1970.

Students at Queens College sought a temporary injunction to force the college to conduct classes as regularly scheduled. The colleges had been closed on May 6 and 7, 1970, because of certain demands and/or disruptions by a portion of the student body. A serious question existed as to when the regular classes of instruction would continue in City University in general and Queens College in particular. Because of this question the Board of Higher Education on May 10 promulgated a resolution to the effect that it was the duty of the City University to remain open and to continue to offer instruction to the students who wished to attend class. The individual colleges were permitted to adjust their programs of courses, attendance, examinations, and grading. Following this resolution the president of Queens College, by two letters, indicated that in addition to the regular courses, seminars would be conducted in subjects of current political interest, that there would be a modification of the grading system, and that faculty did have the responsibility to meet with and teach their students.

The students who brought this suit contended that in many instances the faculty discontinued the regular course of study and suggested that the students attend the seminars, or conducted such seminars themselves in place of the regular courses.

The school officials maintained that there were administrative procedures that the student-plaintiffs could have followed with respect to their grievances. The court noted the short time remaining in the school year and the fact that the administrative procedures could take up to three weeks to complete. Since time was of the essence, the court held that the existence of administrative procedures would not be a bar to this court action.

The court then considered whether or not the college had complied with the resolution of the Board of Higher Education. The court noted that although the resolution of that board gave the college discretion in adjusting its program, there was no discretion as to whether or not to continue the regular course of study, for the board resolution was clear that the college must remain open to offer instruction and that the faculty had the responsibility to meet with and teach the students. The court additionally found that the subject matter of the newly introduced seminars could in no way be found to be an integral part of or related to the courses originally scheduled to be taught. The college was directed to offer to the plaintiffs the courses that had been disrupted or discontinued.

Frain v. Baron
307 F.Supp. 27
United States District Court, E.D. New York,
December 10, 1969.

Three suspended students in the New York City schools brought a civil rights action against school officials. They charged that their rights were violated by being required to leave the classroom when they did not wish to participate in the Pledge of Allegiance to the Flag. The students wished to remain seated during the exercise because they believed that the words "with liberty and justice for all" were not true in America today. In addition, one student was an atheist and objected to the words "under God." The students refused to stand during the Pledge because that would constitute participation, and they refused to leave the classroom because they considered exclusion from the room to be punishment for their exercise of constitutional rights.

School officials asserted that permitting the students to remain seated could be "a real and present threat to the maintenance of discipline" and would be "pedagogically foolhardy."

Looking at past decisions, the court found that the school authorities could not force the students to participate in the patriotic exercises. However, the question of whether they had a right of silent protest by remaining seated had not previously been ruled upon. The court cited the *Tinker* decision of the Supreme Court which upheld the right of silent expression in the classroom by students. Under *Tinker*, the court said, the burden was on the school officials to justify that the particular expression of protest chosen by the students "materially infringed the rights of other students or caused disruption." But mere fear of disorder has been ruled out as justification for a regulation that infringed upon the constitutional freedom of a student. The court found that while the policy of the school officials was a sincere attempt to prevent disorderly reactions, the flaw in the policy was "that the constitution does not recognize fears of a disorderly reaction as ground for restricting peaceful expression of view."

The students were granted a preliminary injunction barring their exclusion from the classrooms during the Pledge of Allegiance.

Johnson v. Board of Education of City of New York
310 N.Y.S.2d 429
Supreme Court of New York, Special Term,
Queens County, Part I, May 1, 1970.

Suspended high-school students brought a mandamus proceeding to compel the board of education to readmit them to classes at Cardozo High School pending the dispostion of criminal charges against them. The students in this action along with 36 other students were suspended as a result of acts committed against the high-school principal. They were also arrested, and criminal charges were brought against them for the same actions. State law provided that students may not be suspended for more than five days without a hearing. School officials refused to reinstate the students without first holding a hearing, and the students refused to participate in a hearing, alleging that they would forfeit their constitutional privilege against self-incrimination by such participation. They also alleged that the arbitrary imposition of penalties for the assertion of constitutionally protected rights was a denial of due process. To settle the matter, school officials had offered the students immediate placement in other nearby high schools; this was also refused.

The court found that a mandamus proceeding could not be brought unless all administrative remedies were exhausted. In this case the administrative remedies consisted of the hearing before the superintendent at which the students could be represented by counsel with the right to cross-examine witnesses, and an appeal to the board of education. It was clear to the court that the students had failed to exhaust their administrative remedies or follow the procedures outlined in the law. The court rejected the students' contention that they could not receive a "fair hearing" because they could not testify in their own behalf since there were 36 other students involved in the incident and each of them could testify. Furthermore, the students had the right to be represented by counsel and to cross-examine witnesses; they also had a right to appeal. Thus, even without their own testimony, the court said, the suspended students could convince the school superintendent, or the school board, on appeal that the suspensions were without merit. If the students were still unsuccessful in gaining readmission, a mandamus proceeding could then be brought in the court.

The petition of the students was dismissed.

Ohio

Guzick v. Drebus
431 F.2d 594
United States Court of Appeals, Sixth Circuit,
September 16, 1970.

Certiorari denied, 91 S.Ct. 941, March 1, 1971.

(See page 46.)

Pennsylvania

Sill v. Pennsylvania State University
315 F.Supp. 125
United States District Court, M.D. Pennsylvania,
August 3, 1970.

Seventeen students at Pennsylvania State University who had been disciplined as a result of a campus disturbance brought suit against the University, seeking to force their reinstatement to full status as students. Currently before the court was a petition by two graduate students who were among those disciplined, seeking immediate reinstatement in order to attend the summer session. They alleged that they would be irreparably injured if they were not allowed to attend summer school.

One student was working on his doctoral dissertation in English and the other on his master's degree in biophysics. The former was the recipient of a fellowship for the fall term and the latter was to be a graduate assistant in the fall. Pending the outcome of the suit, the university agreed to keep both of these positions open and available to the students and also agreed not to notify their draft boards of the disciplinary action against them. The court found that both students would have access to the library and to their professors during the summer, and in the case of the biophysics student the department would maintain his research culture during the summer.

The court found that all the points of the students alleging irreparable harm had been countered by the university except their return to official student status. In light of the numerous concessions of the university, the court held that the absence of official student status did not constitute irreparable harm if preliminary injunctive relief were not granted. The court declined to hold that the mere interruption of a student's education was irreparable harm. The temporary injunction requested by the students was denied, and their dismissals were continued pending final adjudication of the suit.

Tennessee

Caldwell v. Craighead
432 F.2d 213
United States Court of Appeals, Sixth Circuit,
September 25, 1970.

Certiorari denied, 91 S.Ct. 1617, May 3, 1971.

A black high-school student contended that his constitutional rights were violated when he was suspended from the Lebanon high-school band because he stopped playing his instrument and left the gymnasium when the pep band started playing "Dixie." His mother alleged that she was discharged from her job as a teacher's aide at the high school in retaliation for the support that she showed her son in his protest. Both mother and son challenged the constitutionality of certain Christian religious services conducted by the high school during regular school hours. The district court held that the student's suspension from the band was a legitimate disciplinary action made pursuant to a valid band regulation, that the mother was discharged because her work was unsatisfactory, and that both lacked standing to challenge the constitutionality of the religious services. The pupil and his mother appealed.

An attempt was made to make the action a class action on behalf of all blacks in the state of Tennessee against the named defendants of Lebanon school district and "all public school band instructors, superintendents of schools, public high school principals, and boards of education and their members in the State of Tennessee." The appellate court ruled that a class action was not maintainable since the rights the plaintiffs were attempting to enforce were individual rights arising out a unique set of facts not common to all blacks in the state. The same reasoning was applied to the purported defendants, that they were not typical of the class.

Having decided that a class action was not maintainable, the appellate court held that the question of the boy's being dismissed from the band was moot because the family had since moved to another school district and it would serve no purpose to order the student reinstated in the band of a school system that he no longer attended.

However, since the student's mother sought damages for lost wages as well as reinstatement, the court held that the action was not moot as to her, and the merits of her appeal must be considered. The trial court findings, which were supported by substantial evidence, indicated that the dismissal of the student's mother was not racially motivated and was not in retaliation for her support of her son but rather because her work was unsatisfactory. The appellate court refused to reverse the trial court in this issue.

The final issue considered was the constitutionality of the religious services conducted in the schools during regular school hours. The appellate court held that the district court was incorrect in holding that the mother and her son did not have standing to sue on this issue since there was sufficient interest to bring suit if the plaintiffs were either students in the school system or parents of the students. However, the court concluded that this controversy was also moot because the parties were no longer residents of the school system.

NOTE: The Supreme Court of the United States declined to hear an appeal from this decision.

Hobson v. Bailey
309 F.Supp. 1393
United States District Court, W.D. Tennessee, W.D.,
February 20, 1970.

(See page 14.)

Texas

Aguirre v. Tahoka Independent School District
311 F.Supp. 664
United States District Court, N.D. Texas,
Lubbock Division, March 11, 1970.

(See page 47.)

Bayless v. Martine
430 F.2d 873
United States Court of Appeals, Fifth Circuit,
June 24, 1970.

Ten students at Southwest Texas State University were suspended as a result of their participation in the November 1969 Vietnam War Moratorium demonstration. The students brought suit in district court, seeking preliminary and permanent injunctive relief and a declaratory judgment that the regulation under which they were suspended was void. The district court denied the preliminary injunction, and the students appealed. The appellate court stayed the denial of the preliminary injunction and enjoined the students' suspension pending a determination on the merits of the appeal (430 F.2d 872, 1969). This case involved the merits of that appeal.

The November Moratorium was the second in a planned series of demonstrations against the war. In the October 1969 demonstration the students had not confined their demonstration to the times and places set by the university and had disturbed and disrupted regularly scheduled classes. When the time came for the November demonstration, the sponsoring student group wished to use the Huntington Statue area of the campus and to hold the demonstration from 10:00 a.m. untio 2:00 p.m. University regulations provided that students could use what was called the student expression area between noon and 1:00 p.m. and between 5:00 p.m. and 7:00 p.m. by making reservations with the dean of students 48 hours in advance. The place and time demanded by the November demonstration group was not within this regulation.

University personnel sought to secure an auditorium for the demonstration, but none was available. Officials also offered to permit the demonstration to be held in the statue area if it was limited to the noon hour. No attempt was made to show that the student expression area was not available during the hours specified in the regulation.

Despite the offer of the university, the student demonstrators insisted on having the meeting at the place of their choosing. An estimated 50 students congregated in the area, but when the dean of students arrived and told them to leave, only 10 refused and remained. These 10 students were suspended. The demonstration was silent, and no injury was caused to the property.

Despite the orderliness of the demonstration, officials of the college testified that based upon the October experience they did not believe that they could allow the group to continue for the planned four hours in the stated area on campus while classes were in session. The students did not attack the disciplinary procedures under which they were suspended but rather the regulation on permissible demonstrations that they were charged with violating.

The standard of review by the appellate court was whether the district court had abused its discretion in denying the students' application for a preliminary injunction. The lower court had based its denial on the belief that the students would not prevail in a trial on the merits of the case since they had not made a *prima facie* showing that the regulation was unconstitutional on its face or in its application.

The appellate court agreed with the district court and said that the university officials had acted reasonably to balance the interests of the majority of the students in the maintenance of an academic atmosphere conducive to the pursuit of their studies against the rights of those who wished to demonstrate against the war. The court disagreed with the claim of the students that the regulation was invalid because it constituted a prior restraint upon the exercise of their First Amendment rights. It noted that requiring students to reserve the area 48 hours in advance was a reasonable method of avoiding the problem of simultaneous and competing demonstrations. The court ruled that the regulation under attack was a valid exercise of the university's right to adopt and enforce reasonable requirements as to the time, place, and manner of student expression. The fact that the demonstration was quiet, as the students asserted, did not negate the fact that it was in violation of a valid university regulation.

The appellate court concluded that the students had failed to make out a *prima facie* case demonstrating a probability of success on the merits. Consequently, it vacated its preliminary injunction against the students' suspension, affirmed the district court denial of the preliminary injunction, and remanded the case to the district court for a trial on its merits.

Butts v. Dallas Independent School District
306 F.Supp. 488
United States District Court, N.D. Texas,
Dallas Division, December 5, 1969.

(See page 48.)

Virginia

Saunders v. Virginia Polytechnic Institute
417 F.2d 1127
United States Court of Appeals, Fourth Circuit,
November 10, 1969.

A student who had been denied readmission to Virginia Polytechnic Institute (VPI) sought a preliminary injunction against the school. The district court denied the relief, and the student appealed. A circuit court judge issued a preliminary injunction allowing the student to start the fall 1969 term, pending further order of the appellate court to prevent irreparable injury to the student.

The student had resigned from VPI in April 1969, but at the same time he applied for readmission for the September 1969 term. He was accepted for readmission and notified that he would receive a formal notice sometime in August. At the June 1969 commencement week end the student took part in an anti-war demonstration led by a campus group of which he was a member. The demonstration was peaceful and did not disrupt the ceremonies. He was told prior to and during the demonstration that his participation would violate the school rule that those persons who were not matriculated students who participated in picketing, demonstrations, or other similar activity on campus would be asked to leave immediately and would be subject to arrest if they refused. The warnings proceeded on the administrative determination that the student was not a "matriculated student" and hence did not fall within the group that could participate in peaceful demonstrations. No person who engaged in the demonstration was arrested, nor was any other student disciplined. The student was denied readmission to VPI solely because of his violation of the school policy by taking part in the demonstration.

The student alleged that his First Amendment rights were violated, and that short of violent and disruptive activities, he and all other members of the public had the right to protest the war on the VPI campus. The school asserted that persons detrimental to its well-being may be excluded from the campus; and that since the student was not a matriculated student, he could be refused readmission because of his participation in the demonstration.

The court held that students have a basic right to express peaceful dissent on campus. A state university may not restrict or deny this right as long as the exercise of the right is not obstructive or disruptive. To deny the right of free expression to this student, the court said, VPI must show that its classification of students into two groups, matriculated and nonmatriculated, with the authority to discipline the latter for demonstrating, reflected a fundamental and basic difference and was "necessary to promote a *compelling* governmental interest." The court was of the opinion that these differences were totally lacking and found no "*compelling* governmental interest" to support the classification. The court noted that all VPI students are required to apply for readmission each fall; therefore, as to the student in this case, "his right to attend classes in the fall was neither greater nor less than those who demonstrated with impunity."

The court held that VPI's denial of readmission to the student violated his First Amendment rights, that the disciplinary action of the school must be set aside, and that the student be reinstated. The district court was directed to extend the preliminary injunction already granted by the appellate court and to make it permanent if there were no remaining areas of proof to be considered.

Seymour v. Virginia Polytechnic Institute and State University
313 F.Supp. 554
United States District Court, W.D. Virginia,
Roanoke Division, May 14, 1970.

Suspended students sought a temporary restraining order against the university. The court denied the requested relief, stating that a minority of the students could not take over and occupy college buildings by sheer force in the name of dissent. The court said that it desires to fully preserve the right of peaceful and orderly dissent, but at the same time it will not overturn the decision of college officials in suspending those students who seek by force to thwart not only the operation of the college but also their education and that of fellow students. A court hearing for a later date was set.

Wisconsin

Asher v. Harrington
318 F.Supp. 82
United States District Court, E.D. Wisconsin,
October 12, 1970.

A group of students at the Madison and Milwaukee campuses of the University of Wisconsin brought suit against university officials. Their complaint charged "failure to reasonably maintain the University in operation for the benefit of the majority of students." The students alleged that they paid their tuition and had a right to use the campus, attend classes, and pursue an education, and that during the spring 1970 semester they were denied these rights because of the actions of the university officials.

The first two causes of the complaint averred that these students were denied their civil rights and denied equal protection of the law because the officials permitted the misuse of university facilities and permitted acts of physical coercion and intimidation against them. The third cause of action alleged that the university breached its contract with the students by failing to provide them with an opportunity to pursue their continued education. The university officials moved to dismiss the action.

The court determined that the first two causes of action did not sufficiently allege facts to qualify as civil rights complaints. Although the students asserted that the actions of the university officials "discriminatorily deprived plaintiffs of their rights of free speech, free inquiry, free thought and free assembly," the court held that this was a mere conclusion and that there was no logical connection between this conclusion and the statement of facts set out in the complaint. The court found the same logical connection lacking in the complaint that the students were denied equal protection of the laws. Further, the third cause of action standing by itself did not qualify for federal jurisdiction. Since it alleged a breach of contract, the court held that this cause of action properly belonged in a state court.

The motion of the university officials to dismiss the action was granted.

Buck v. Carter
308 F.Supp. 1246
United States District Court, W.D. Wisconsin,
January 7, 1970.

Students suspended from Wisconsin State University sought to be readmitted to school, pending a full hearing on the charges against them. The students had been suspended because they were allegedly in a group that invaded a fraternity house, beat some of the residents, and caused damage to the property.

This district court had previously set out guidelines to be followed in cases involving student suspensions pending hearings. Those guidelines stated that any temporary suspension of the student must be preceded by a preliminary hearing unless such is impossible, and that a temporary suspension must be for reasons relating to the physical and emotional safety and well-being of the student or the safety and well-being of other students, faculty, or university property.

In defining the function of a preliminary hearing, the court said that when university authorities receive information of student misconduct, the first step should involve an evaluation of the reliability of the information received both as to the occurrence of the incident and as to the students involved and such other investigation as appears necessary. The court found that this was done by the president of the university and that he also was justified in concluding that the students, who had been members of the party that invaded the fraternity house, should be promptly separated from the university for reasons relating to safety and well-being of students, faculty, or university property. The next step as outlined by the court was also followed by the university in that prior to the temporary suspension the students appeared before the president on the morning after the incident, at which time they were informed of the nature of the offense with which they were charged and were given an opportunity to make a statement. The students were accompanied by an attorney who answered for all of them, making a general denial of the charges. None of the students specifically denied being present at the incident.

The students argued before the court that they were denied due process in the preliminary hearing before the president, but the court found their contentions were without merit. The motion of the students for a preliminary injunction was denied.

Soglin v. Kauffman
418 F.2d 163
United States Court of Appeals, Seventh Circuit,
October 24, 1969.

(See *Pupil's Day in Court: Review of 1969*, p. 57.)

The University of Wisconsin at Madison appealed from a decision of the district court, holding that disciplining students for "misconduct" standing alone was unconstitutional. The plaintiffs in this action were 10 students who were suspended for "misconduct" arising out of their protest of the Dow Chemical Company campus recruiter. The students had alleged and the district court had held that the term "misconduct" as a basis for discipline violated the due process clause of the Fourteenth Amendment by reason of vagueness and overbreadth.

On appeal the university first argued that the district court did not have jurisdiction of the case because the students were not engaged in constitutionally protected conduct. The court disagreed with this argument, saying that the conduct of the students was not determinative of jurisdiction. Rather, the question was whether the students were deprived of their constitutional rights regardless of the character of their behavior. The court ruled that there was jurisdiction because the complaint alleged that the use of the standard of misconduct as a basis for disciplinary proceedings deprived the students of constitutional rights. The same reasoning, the court held, applied to the standing of the students to bring the action, saying, "They are entitled to contend that the disciplinary proceedings were invalid deprivations of due process because based upon nonexistent or unconstitutionally vague standards."

As to the merits of the controversy, the university contended that the "misconduct" doctrine does not constitute a "standard" of conduct and that it was not used as such. The university officials argued that the "misconduct" doctrine represents the inherent power of the university to discipline students and that this power may be exercised without the necessity of relying on a specific rule of conduct. The court agreed that the university has the power to discipline students but said, "Power alone does not supply the standards needed to determine its application to types of behavior or specific instances of 'misconduct'." School administrators, the court stated, must act in accord with rules meting out discipline, and the rules embodying standards of discipline must be contained in properly promulgated regulations. The court held that in this case the disciplinary proceedings against the students must fail to the extent that the university officials did not base the proceedings on the students' disregard of university standards of conduct expressed in reasonably clear and narrow rules.

Further, having charged the students with the offense of "misconduct," the court continued, the university could not then claim that misconduct was not used as a standard. Affirming the lower court decision, the appellate court said that the use of "misconduct" as a standard in imposing penalties on the university students must fall for vagueness. Holding that the rule was constitutionally inadequate on its face in that it contained no clues as to what conduct was susceptible to punishment, the appellate court said ti was not necessary for the lower court to make any findings with respect to the students' activities that led to the discipline.

The court did not require university codes of conduct to satisfy the same standards as criminal statutes but did hold that "expulsion and prolonged suspension may not be imposed on students by a university simply on the basis of allegations of "misconduct" without reference to any preexisting rule which supplies an adequate guide." For the possibility of a sweeping application of the standard of "misconduct" to protected activities of students does not comport with guarantees of the First and Fourteenth Amendments.

Wyoming

Williams v. Eaton
310 F.Supp. 1342
United States District Court, D. Wyoming,
March 25, 1970.

Fourteen black football players sued the head football coach of the University of Wyoming and other university officials, seeking injunctive relief and compensatory and punitive damages. They alleged that they were suspended and dismissed from the football team in violation of their constitutional rights to peacefully demonstrate and sought to enjoin the university from disciplining them in any way.

The controversy arose over a scheduled football game between the University of Wyoming and Brigham Young University, which is owned and operated by the Mormon Church. The black players wished to wear black armbands during the game as a protest against the alleged racial discriminatory policies of that church. They confronted the head coach with the request to wear the armbands. He denied the request, noting that the players were in violation of a coaching rule that prohibited members of the football team from engaging in demonstrations and protests. For violation of this rule they were suspended from the team.

Many efforts were made to resolve the dispute, including a hearing held before the board of trustees which the governor attended as an ex-officio member of the board. At this hearing each of the players was given an opportunity to be heard. The players insisted and demanded of the board that they be permitted to wear black armbands during the scheduled game. Certain of the players also stated that they would not return to the team so long as the head coach remained. Following this hearing, the board of trustees ordered that the 14 players be dismissed from the team on the grounds that should the university permit them to wear the armbands during the game, the university would be violating the constitutional mandate requiring complete neutrality between religion and nonreligion.

The court granted the university's motion to dismiss the action. The court found that the plaintiffs had failed to state a claim upon which relief could be granted. The university was an instrumentality of the state, so that in reality the action was against the state of Wyoming. The state enjoyed governmental immunity and could not be sued for damages without its consent.

In this case, the court said, the complaint did not allege that the defendents were personally liable, and the state had not consented to be sued. Further, the complaint should be dismissed for lack of jurisdiction because the claim for damages was insubstantial and totally speculative.

The court found that the 14 players were afforded procedural due process in the hearing before the board of trustees, and held that if the university had allowed the planned demonstration under the guise of freedom of speech, such action "would have been violative of the First Amendment of the United States Constitution prohibiting the establishment of religion, mandating upon the states the principle of separation of church and state and the requirement of complete neutrality." The court further found that such action would have violated the state constitutional provision of freedom of religion.

Publication and Distribution of Literature

California

Baker v. Downey City Board of Education
307 F.Supp. 517
United States District Court, C.D. California,
December 17, 1969.

The president of the senior class and the president of the student body at Warren High School were suspended from school for 10 days and removed from their student offices. The disciplinary action arose from their distributing just outside the front gate of the high school a publication called *Oink*. Nine previous issues had been published and distributed by the two students prior to the suspension action taken because of the "profanity and vulgarity" in this controversial issue. The students brought suit, contending that they were illegally suspended in violation of their First Amendment right to free speech, without due process, and contrary to state law. The students also asserted that they had not violated their oath of office, a basis for their suspension, and should not have been removed from office and that there was no distribution of the paper on campus.

In support of their position that their constitutional right to free speech was violated, the students argued that the publication did not cause disruption or interference with the normal education program of the high school, and that they were merely expressing their views and opinions which they had the right to do. To support this argument, the students relied on *Tinker v. Des Moines Independent Community School District* (89 S.Ct. 733 (1969)). That case held that mere apprehension of a disturbance was insufficient to justify interference with First Amendment rights of students. The court said that in the instant case there was more than the mere apprehension of *Tinker*; in fact some 25 to 30 teachers had reported to the principal that their classes were being interrupted or distracted by students reading and talking about the paper.

With regard to the due process claim of the students, the court noted that state law provided that parents of a suspended student shall, before the third day of the suspension, be asked to attend a meeting with school officials during which matters pertaining to the suspension would be discussed. Although no specific request was made of the students' parents to attend a meeting, the superintendent did speak by phone or in person with the parents and showed them the pertinent sections of state law and school-board policy that were relied upon in suspending their sons. The court concluded that the intent and purpose of the state law as to required procedures were fulfilled. The students also contended that their right to due process was violated in that they were not given specifications of charges, notice of a hearing, and a hearing prior to their suspensions. The court observed that the cases relied upon by the students to support this contention involved the more drastic action of expulsion, not just a temporary suspension. The court was satisfied that administrative procedural rights were accorded the students, and due process was satisfied. The students also asserted that the terms "profane" and "vulgar" were unconstitutionally vague. The court disagreed and found that the statements were sufficiently clear.

The pupils asserted further that state law sets forth the grounds for temporary suspensions and that these grounds are exclusive. State law refers to "habitual profanity or vulgarity" as a ground. The school authorities, however, denied that the grounds in the statute were exclusive. The court found that ample authority to support the suspensions was here and that the grounds for suspension listed in the statute were not exclusive. The court further found that "the action taken was a reasonable exercise of the power and discretion of the secondary school authorities in the maintaining of an atmosphere conducive to an orderly program of classroom study and learning and respect for legitimate and necessary administrative rules and State laws."

Likewise rejected by the court was the argument of the students that they had not violated their oath of office. The court found ample evidence based on the vulgarisms in the publication as well as other conduct to justify their removal from office. Nor was the argument that the distribution had not taken place on campus of aid to the students. The court said that school authorities are responsible for the morals of students going both to and from school as well as during the time that they are on campus.

In concluding that the First Amendment rights of the students were not violated, the court stated that the First Amendment does not give a person the right to say anything one may please in any manner and place. The constitutional right to free speech may be infringed upon by the state if there are compelling reasons. The school authorities here were justified in their conclusion that the publication in question contained profane and vulgar expressions. In the circumstances of this case, the court determined that the students' First Amendment rights to free speech did not require the suspension of decency in the expression of their views and opinions. The court decided that the school officials "took such action as in their discretion the situation required and in a conscientious endeavor to fulfill their duty to the State and the members of the student body, that the action was appropriate in the circumstances and supported by the authorities." The relief sought by the students was denied.

Connecticut

Eisner v. Stamford Board of Education
314 F.Supp. 832
United States District Court, D. Connecticut,
July 2, 1970.

High-school students sought a judgment upholding their right to distribute a student newspaper on school grounds without prior approval of the content. Both the students and the board of education moved for summary judgment. It appeared that the students were authors and publishers of an independent, mimeographed newspaper entitled *Stamford Free Press*. Three issues had been distributed off school grounds without incident. When an attempt was made to distribute the fourth issue on school grounds, the students were warned that they would be suspended if the activity continued. At the time a school-board regulation prohibited "using pupils for communications." After suit was filed, the board of education restated its policy on the matter and enacted the following policy: "No person shall distribute any printed or written matter on the grounds of any school or in any school building unless the distribution of such material shall have prior approval by the school administration." The guidelines for the enforcement of this policy provided that no material could be distributed if either the content or the manner of distribution would be likely to cause disruption in the schools. The students contended that this policy violated freedom of speech and press as guaranteed by the First Amendment. On the other hand, the school board argued that the regulation was a valid exercise of the board's inherent power to impose prior restraints on the conduct of students.

The students acknowledged that the board had the authority to regulate the conduct of students, to issue guidelines on the permissible content of the newspaper, to prohibit obscene or libelous material, and to regulate distribution of student material. Thus, the question before the court was the validity of the requirement that the content of the material be submitted to school authorities for approval prior to distribution.

The court found that students have a right to freedom of expression but that this freedom is not absolute and the "heavy presumption" against restrictions on free speech and press may be overcome "in carefully restricted circumstances." In this case the school board had not, in the words of the court, "produced a scintilla of proof which would justify the infringement of the students' constitutional rights to be free of prior restraint in their writings."

The court said that even if the school officials had sustained their burden of proof and demonstrated a necessity for the regulations, none of the procedural safeguards designed to obviate the dangers of censorship were present. The regulations did not specify the manner and to whom material must be submitted, the time in which a decision must be reached, nor did they provide any hearing or right of appeal. The court was of the opinion that reasonable regulations could be devised to prevent disruptions in the high school and at the same time protect the rights of the students to express their views through their newspaper. However, the court ruled that the blanket prior restraint used by the school board in this instance was not permissible and was constitutionally invalid. Summary judgment in favor of the students was granted.

Illinois

Scoville v. Board of Education of Joliet Township High School District 204
425 F.2d 10
United States Court of Appeals, Seventh Circuit,
April 1, 1970.

Certiorari denied, 91 S.Ct. 51, October 12, 1970.

(See *Pupil's Day in Court: Review of 1968*, p. 12; *Review of 1969*, p. 58.)

Two high-school students were expelled in January 1968 because they wrote, published off school grounds, and sold in school a magazine entitled *Grass High*. Among other things the publication contained an editorial critical of the school administration. Following their expulsion, the students brought suit seeking readmission to school. The district court dismissed their action, based in part on a finding that the complaint on its face alleged facts which "amounted to an immediate advocacy of, and incitement to, disregard of school administrative procedures." The Court of Appeals affirmed the judgment but subsequently granted this rehearing of the case.

On rehearing, the appellate court found that the district court had implicitly applied the "clear and present danger test" and had found that the distribution of the publication constituted a direct and substantial threat to the effective operation of the high school. The appellate court noted that at no time either before the school board or before the lower court was the expulsion justified on grounds other than the objectionable content of the publication. Nor was any evidence introduced to show that the distribution of the publication caused any commotion or disruption of classes.

Relying on *Tinker v. Des Moines Independent Community School District*, the students contended in this appeal that their expulsion violated their First and Fourteenth Amendment freedoms. The rule enunciated in *Tinker* presented to the appellate court the question of whether the writing and sale of *Grass High* could "reasonably have led [the board] to *forecast* substantial disruption of or material interference with school activities . . . or intru [sion] into the school affairs or the lives of others." The appellate court held that the district court was incorrect in deciding that the complaint "on its face" disclosed a clear and present danger justifying the school officials to "forecast" the harmful consequences referred to in *Tinker* rule.

Since the freedom of expression of the students had been infringed upon by the board, the appellate court said, the board had the burden of showing that the expulsion action was taken upon a reasonable forecast of disruption of school activity. The court found that no reasonable inference of such a showing could be made from the facts recited in the complaint. The appellate court also said that the district court had failed to apply the proper rule of balancing the interests of the students in their right to free expression against the interest of the school district in maintaining order in the schools. No evidence was taken on any issues pertinent to the case.

The appellate court concluded that on the basis of the admitted facts and exhibits, the school board could not have reasonably forecast that the publication and distribution of the paper would substantially disrupt or materially interfere with school proceedings; and that absent an evidentiary showing and appropriate balancing of the evidence to determine whether the board was justified in a forecast of disruption and interference as required by *Tinker*, the students were entitled to the relief they sought.

The decision of the district court dismissing the students' complaint was reversed, and the case was remanded for further proceedings.

NOTE: The Supreme Court of the United States declined to hear an appeal in this case.

Maryland

Korn v. Elkins
317 F.Supp. 138
United States District Court, D. Maryland,
September 17, 1970.

Undergraduate students at the University of Maryland brought suit against various school officials, challenging the refusal of the university to permit the publication of an issue of the student feature magazine, *Argus*, with a cover picture of a burning American Flag.

A Maryland statute provided: "No person shall publicly mutilate, defile, defy, trample upon, or by word or act cast contempt upon any such flag, standard, color, ensign or shield" of the United States or of the State of Maryland. The definition of "flag, standard, color, ensign or shield" included any "copy, picture or representation thereof." A three-judge federal court was convened to hear the students' contention that the statute was unconstitutional.

The publication of the magazine is the responsibility of the student editors. It is financed through student activity fees which are collected from each student. In the fall of 1969, the editors of *Argus* met with a representative of the university to arrange for a printer for the magazine. The first printer chosen refused to print the cover, believing that he would be subject to prosecution under the quoted Maryland statute. A second printer was then selected, and shortly thereafter a university official informed the students that the state attorney general had told the university president that publication of the cover would violate the statute. The university then effectively stopped publication by telling the printer that it would not pay for the work if the cover was printed. The magazine was printed with a plain white cover bearing the word "censored."

The three-judge court noted that in ***Street v. New York*** (89 S.Ct. 1354, (1969)) the Supreme Court of the United States reversed a criminal conviction under a New York statute couched in almost identical language as the Maryland statute under attack here. The defendant in that case had burned an American Flag on a New York street corner and made statements such as, "If they let that happen to Meredith [James Meredith, a civil rights leader who was shot] we don't need an American flag." The Supreme Court did not consider whether the New York statute was unconstitutional on its face, holding that it was unconstitutionally applied because it permitted the defendant to be punished for merely speaking defiant or contemptuous words about the Flag. The Court cited four governmental interests which might conceivably have been furthered by punishing the defendant for his crime and found that the record did not justify his conviction under any of them.

Applying ***Street*** to this case, the three-judge court found nothing in the record to suggest that any of the four governmental interests were offended. The court said that here there was only expression in the form of art and ***Street*** clearly required the protection of this expression. In view of the absence of any showing that suppression of the contents of the magazine was necessary to preserve order and discipline on campus, the court held that the Maryland statute was unconstitutionally applied. The court did not reach the question of the constitutionality of the statute.

The court declared that "the Maryland flag desecration statute cannot be applied by officials of the University of Maryland to prohibit future publication of issues of *Argus* containing contents of the type excised from the December, 1969 issue."

Massachusetts

Antonelli v. Hammond
308 F.Supp. 329
United States District Court, D. Massachusetts,
February 5, 1970.

The former student editor-in-chief of *The Cycle*, the campus newspaper of Fitchburg State College, brought suit against the college president, charging a violation of constitutional rights.

The court made the following findings of fact: The student was elected editor-in-chief of the newspaper by the college student body; the newspaper was not financially independent but depended on revenue derived from compulsory student activity fees; when an issue of the newspaper containing an article by Eldridge Cleaver was submitted to the usual printer, he refused to print it, alleging that the article was obscene, and so informed the college president; the president was also displeased with the proposed issue as well as with the change in format and focus of the paper and thereupon said that he would refuse to allow publication of future editions of the newspaper unless they were submitted to an advisory board for approval. Prior to this suit the issue containing the controversial article was published without college funds. To allow the newspaper to continue publication pending these proceedings, the editor submitted to the authority of the advisory board, but after one issue he resigned. There have been no further issues of the publication. No guidelines were established by the president for the advisory board, and they had control over the entire content of the newspaper.

The first issue before the court was whether or not the case was moot. The court said that the student editor had no legally cognizable interest in a decision of the court as to the constitutionality of the president's efforts to prevent publication of the disputed issue since he was no longer editor, none of his own funds had been used to publish the issue in question, and the faculty advisory board did not in fact ever censor any material. However, because the student would most likely be re-elected editor and would have an interest in being free from the burden of prior censorship, the court concluded that he did have a continuing personal stake in the outcome of the proceedings and that the case was not moot.

The court then considered the merits of the student's claim to freedom from censorial supervision by the advisory board. The court noted at the outset that there was no limitation on the authority of the board and that its power to review and approve could presumably be used to achieve complete control of the content of the newspaper. Although the advisory board proposed to suppress only obscene material, the court found the manner and means of achieving the proposed suppression to be of crucial importance. "Whenever the state takes any measure to regulate obscenity it must conform to procedures calculated to avoid the danger that protected expression will be caught in the regulatory dragnet," the court said. The court found procedural safeguards of the type required by the First Amendment to be lacking in the system set up by the president for passing on the newspaper's content. The court concluded that the college president's establishment of the advisory board was prima facie an unconstitutional exercise of state power.

If the advisory board is to withstand constitutional challenge, the court said, it would be only because there is something in the institutional needs of a public university or in the nature of a campus newspaper funded by student activity fees that justifies a limitation on free expression. The court did not find any such justification in this case. The court said, "Obscenity in a campus newspaper is not the type of occurrence apt to be significantly disruptive of an orderly and disciplined educational process."

Because of the potentially great social value of a free student voice in an age of student awareness and unrest, the court said, it would be inconsistent with basic assumptions of First Amendment freedoms to allow a newspaper to be merely a forum for ideas the state or the college administration deem appropriate. Accordingly, the court held that since "(a) there is no right to editorial control by administrative officials flowing from the fact that *The Cycle* is college sponsored and state supported, and (b) defendant [president] has not shown that circumstances attributable to the school environment make necessary more restrictive measures than generally permissible under the First Amendment," the prior submission of material to be published to the advisory board may not be constitutionally required by means of withholding funds or otherwise.

Michigan

Vought v. Van Buren Public Schools
306 F.Supp. 1388
United States District Court, E.D. Michigan, S.D.,
May 8, 1969. Supplemental Opinion June 13, 1969.

An expelled high-school student filed a motion for a temporary restraining order and a preliminary injunction to force his readmission to school. The court granted the restraining order and ordered the student reinstated. Thereafter the court held a hearing on the preliminary injunction at which time the school officials moved to dismiss the action.

The student had been expelled for alleged possession of obscene material in violation of a school directive. The student had previously been found with obscene literature in his possession and had been informed by the school principal that a future offense would make the student liable for suspension and expulsion. Shortly thereafter the student found an old issue of a tabloid newspaper *Argus* in his locker and placed it in his notebook to take it out of school. During the course of the school day, *Argus* disappeared from the student's notebook. Four days later the student was informed by the principal that he was suspended from school until further notice because it was reported that he had had *Argus* in his possession. The principal told the student and his mother that they would be informed when the matter would be brought before the school board. This was later confirmed in a letter from the principal accompanied by a copy of his recommendation that the student be expelled for the rest of the year. Subsequently the parents received a letter stating that the board had considered the matter and that the student had been expelled. After the board refused to rescind the expulsion, suit was filed in which the student alleged deprivation of First and Fourteenth Amendment rights.

The court deemed the allegation of a violation of First Amendment rights to be unsubstantial issue. The court felt that the type of regulation under consideration was within the power and duty of the school officials and was not violative of the student's rights. The court then considered the allegation of the student that his expulsion without any semblance of a fair hearing violated due process. The court held that the explusion of the student without being given a hearing was unfair treatment that constituted a denial of due process. The court said that the student was entitled to "the observance of procedural safeguards commensurate with the severity of the discipline of expulsion."

The motion of the school officials to dismiss the action was held in abeyance for five days to enable the board to provide the student with a fair hearing.

The court issued a supplemental opinion following the hearing which the school board had been directed to hold. Subsequent to the board hearing, the parties appeared in court at which time additional arguments were made. A magazine which was available in the school library and a novel which was required reading for the tenth grade were introduced into evidence. Both contained language similar to that found objectionable in *Argus*. While it was not contested that the first material found in the student's possession was obscene, there was a question in the mind of the student that *Argus* was in the same category, and for this reason wanted to get it out of his locker.

The court found that the student was expelled solely because of certain words in *Argus* that could also be found in the two publications introduced as evidence. The court held that it was contrary to any sense of fairness or consistency to the student to make judgment on obscenity that the court would find difficult to make. The court did not rule on the issue of obscenity but rather on the inconsistency that it found to be so inherently unfair as to be arbitrary and unreasonable, and thus constituting a denial of due process. The court concluded that the student's expulsion could not stand.

Tennessee

Norton v. Discipline Committee of East Tennessee State University
419 F.2d 195
United States Court of Appeals, Sixth Circuit,
November 28, 1969.

Eight students who were suspended from East Tennessee State University brought suit to force their reinstatement. The district court denied relief, and the students appealed.

The disciplinary action arose when each of the students distributed on campus material that the university officials considered inflammatory. The Disclipline Committee took immediate action and sent three-day notices of a hearing to be held on the charges to all but two of the students involved who received a one day's notice.

The lower court held an evidentiary hearing at which none of the students denied that he had distributed the material. University officials testified that they had definite fears of disruption on the campus. The lower court found that the material distributed could be interpreted as encouraging violent demonstrations such as had occurred on other campuses.

The students contended on appeal that the distribution of the material was protected conduct under the First Amendment as an expression of free speech. They relied principally on the 1969 Supreme Court decision in *Tinker v. Des Moines Independent Community School District* (89 S.Ct. 733). The court disagreed that *Tinker* was applicable, noting the conduct in that case was a silent protest and not urging a riot. The court held that the university authorities had the right to take immediate action and did not have to wait until there was trouble prior to taking disciplinary action.

The appellate court also ruled that the students had not been denied due process and agreed with the district court that the charges against the students that the literature was false and inflammatory was sufficiently definite. The order of the district court denying the motion of the students for reinstatement was affirmed.

Texas

Channing Club v. Board of Regents of Texas Tech University
317 F.Supp. 688
United States District Court, N.D. Texas,
Lubbock Division, September 17, 1970.

Students interested in or associated with the Channing Club brought suit against the board of regents and other Texas Tech officials. The suit arose when the college refused to permit the circulation and distribution of one issue of *The Catalyst*, a tabloid newspaper irregularly published by the Channing Club and addressed to the students and faculty of the university. Previous issues of the paper had been sold on campus without incident, but this issue was banned because the college officials felt that they had the right "to prohibit the sale and distribution of printed matter which does not have any literary value and which uses lewd, indecent and vulgar language." This action was taken under a regulation which provided that misconduct which may lead to disciplinary action includes "lewd, indecent or obscene conduct or expression on University-owned-or-controlled property" and "selling and soliciting on the campus without official authorization."

The students offered in evidence a number of publications which were sold in the student union and at the campus bookstore, the same places where *The Catalyst* was sold, which contained the same or similar language that the school officials found objectionable in *The Catalyst*. The officials admitted that none of these publications had been prohibited from sale or distribution on campus. The students also exhibited numerous publications taken from the campus library, many of which were either required or recommended course reading, that contained essentially that language found objectionable in *The Catalyst*. Based on these exhibits, none of which was banned, the students alleged that the action of the officials subjected them to capricious and arbitrary treatment and denied them the equal protection of the laws. The students also attacked the regulations quoted above as being unconstitutional because of vagueness, or alternatively, unconstitutionally applied.

The court noted that the students had a constitutionally guaranteed right of freedom of expression, including freedom of the press, which is protected on the campus of a state universtiy but which may be regulated by the university in the promotion or protection of a valid institutional interest. In this instance the court found that the restrictions placed on *The Catalyst* were a direct limitation by the state on the content of student expression. Such First Amendment regulation must be founded on substantial justification or overriding governmental interest, the court said. Here the court found that no justification had been shown to exist. The possibility of a disturbance as alleged by college officials caused by the distribution of the paper was insufficient to justify the limitation imposed.

Finding no substantial justification for school officials to invade protected rights, the court then considered the issue of whether the students were treated discriminatorily and denied equal protection of the laws. The court said that the fact that library and other publications assigned for study and examination included the same or similar language as *The Catalyst* would not be grounds for the students to claim discrimination. "But numerous other publications, not banned, and sold from the same location as *The Catalyst*, contained language identical to that objected to here which does sustain the allegation of discrimination and denial of equal protection." There being no legal distinction between the types of publications, the court said, the state does not become privileged to ban a publication merely because it is edited and published by students. The court held that this alone was sufficient to justify the issuance of the requested injunction. Accordingly, the injunction was granted, permitting the students to sell and distribute *The Catalyst* in the same manner and in the same places as it was formerly distributed and sold.

Sullivan v. Houston Independent School District
307 F.Supp. 1328
United States District Court, S.D. Texas,
Houston Division, November 17, 1969.

Two high-school seniors were expelled from school because of their involvement in the production and distribution of a newspaper called *Pflashlyte* which criticized school officials. They brought suit for an injunction to reinstate them and for declaratory relief against certain regulations of the school district. Sharpstown Junior/Senior High School was in its first year of operation during the time these two students were seniors. After several months of school these students and others became concerned with the absence of written rules and regulations governing student conduct. Several incidents that were upsetting to the students occurred. After these incidents these two seniors decided that they would put together a newspaper to voice their dissatisfactions with the school and their beliefs. The printing of the paper was done at the University of Houston print shop under the technical auspices of the Students for a Democratic Society (SDS). This was done because only university-approved organizations had access to the use of the print shop. An introductory issue and two regular issues were published in this manner.

Several other students helped the boys distribute the paper, and all were instructed not to hand out the paper on school grounds or during school hours. They were also asked to tell students not to take the paper into school and if they did, to keep it out of sight. Some issues were found in the school, and some students had the paper taken away from them in class by teachers. When the principal learned of the presence of ***Pflashlyte*** in the school building, he became quite anxious and resolved that the students responsible would be expelled immediately. After an investigation he called the two students into his office. Both admitted that they had distributed the paper. He advised them that their actions were serious violations of "school regulations" especially because of their involvement in a "secret organization." Neither was informed what disciplinary action, if any, would be taken against them and in fact did not find out about their explusion until after their parents were informed. The parents asked if the boys could remain in school if publication of the paper were stopped, but the principal responded in the negative. The students attempted to gain admission to another Houston high school but were unsuccessful in their efforts. After this suit was brought, the court entered a preliminary injunction which required that the students be reinstated, pending a hearing on the merits.

The students charged that they were expelled from school in violation of their right to freedom of speech and due process of law. The school officials responded by arguing that their actions were justified because the "newspaper" created such "disruption" in the school's daily operation that the result was "complete turmoil ' among students. The authorities also contended that the contents of the paper "amounted to an immediate advocacy of an incitement to disregard school administrative procedures and policies and that the paper was calculated to encourage insubordination to school authority." The officials asserted that their actions were justified in light of information they had received to the effect that two radical organizations, SDS and its high-school affiliate, were attempting to "infiltrate" Houston high schools.

The school officials asked the court to hold action in abeyance until the students had exhausted their administrative remedies. The court declined to do so since it appeared that the students did in fact avail themselves of the administrative remedies by their unsuccessful search for another high school to attend. Also, there did not seem to be an appeal to a central administrative office available to these students. The officials then sought to dismiss the action charging first that the court was without jurisdiction. The court disagreed with this contention as well as with the contention that the students had not brought a proper class action. Also rejected was the argument that the case was moot since both students had graduated by the time that the case was heard on the merits. The court held that since the expulsion would be on the records of the students, they were entitled to a judicial determination.

The court considered the First Amendment arguments of the students, and relying on *Tinker v. Des Moines Independent Community District*, (89 S.Ct. 733 (1969)), held that high-school students are entitled to protection of their constitutional rights so long as exercise of them does not unreasonably interfere with normal school activities. The court concluded that students had the right to express themselves on campus, subject to reasonable limitations as to time, place, manner, and duration. The question then became whether these students materially interfered with the requirements of appropriate discipline in the operation of the high school. After hearing all of the evidence, the court was convinced that the interruptions and distractions that were attributable to the distribution of the newspaper were minor and few in number. The court also found that although the paper contained articles critical of school administration, the criticism was on a mature and intelligent level and hardly of the type to "incite insubordination." The court declined to even comment on the argument that the schools were becoming "infiltrated" and concluded that the two students were disciplined solely because school officials disliked the contents of ***Pflashlyte*** and that the Constitution prohibits such action.

The students also contended that their expulsion did not meet minimal standards of due process, and the court agreed. The students were never told why their newspaper violated school regulations, nor were they given any opportunity to present a defense or explain the reasons for publishing the paper. Concluding that the school officials deprived the students of their First Amendment rights and denied the students due process of law, the court ruled that the students were entitled to a judgment that they were wrongfully suspended from the school.

The last contention of the students was that certain regulations of the school district were unconstitutionally vague. This cause in the complaint was presented as a class action on behalf of all secondary students in the district. The parties agreed that the only rule of the school district pertaining to publication and distribution of materials not sanctioned by the school was that each principal could make rules for his own school, and this high school had no such written rules. Lastly, it was stipulated that this school district rule was construed to prohibit the type of publication put out by these students. The court held that since this was the only standard available to the students by which they could guide their conduct, the rule was vague and overbroad.

The court issued a permanent injunction prohibiting school officials from imposing serious disciplinary actions, in the absence of precise and narrowly drawn regulations, on students who write, print, distribute, or otherwise engage in the publication of newspapers either on or off school premises during school hours or nonschool hours unless such activities materially and substantially disrupt the normal operation of the school. The officials were also enjoined from expelling or suspending for a substantial period of time students who were guilty of any misconduct without compliance with the minimum standards of due process including formal written notice of charges and of the evidence against them, a formal hearing with an opportunity to present witnesses and evidence, and imposition of sanctions only on the basis of substantial evidence.

Other Disciplinary Activities

Arizona

Burnkrant v. Saggau
470 P.2d 115
Court of Appeals of Arizona, Division 1, Department B,
June 4, 1970.

The Scottsdale Union High School District appealed from the lower court order that it reinstate a suspended student. The student had been suspended in May 1969 for the balance of the semester for his second offense of violating a school rule prohibiting smoking on school grounds. The suspension order was made and signed by a part-time teacher and part-time administrative assistant, acting in the latter capacity. A few days after the suspension, the student sued to require his immediate readmission. The trial court granted his request with the provision that if its judgment was reversed on appeal, academic credit for the semester could be withheld.

The first question raised on appeal was whether the court action was moot as alleged by the student. Following the lower court order the student was immediately readmitted to school. The semester had passed as well as the majority of the next school year. The student argued that if the school district were permitted to withhold the credits for his previous year, it would create a great hardship for him. The court denied the student's request to dismiss the action as moot.

The next question was whether the student was required to exhaust his administrative remedies prior to bringing suit as the school authorities had argued. The principal had testified that these administrative remedies included an appeal to the principal, the superintendent, and the board of education. However, nowhere were these procedures written down and made available to persons who might wish to use them. The court said that although the general rule requires a person to exhaust administrative remedies prior to seeking relief in the courts, this presupposes that there are ascertainable administrative remedies to follow. Since that was not the case in this instance, the remedy selected by the student was proper.

The third issue on appeal concerned the merits of the case. The lower court had found that the administrative assistant did not have the authority to suspend the student. This finding was based on state law which permits suspension of a student by a superintendent or a principal in schools that employ a superintendent or a principal, and permits suspension by a teacher only in schools which have neither a principal nor a superintendent. In view of these statutory provisions, the appellate court held that suspensions could not be made by the administrative assistant in a school that had a principal. The fact that the suspension was subsequently ratified by the principal, the court found to be of no effect. The court said that this ruling was not intended to limit the powers of teachers to take appropriate action under extraordinary circumstances, but if formal suspension is to be the result, it must be implemented by personnel given that authority by statute. The judgment of the lower court was affirmed.

California

Perlman v. Shasta Joint Junior College District Board of Trustees
88 Cal.Rptr. 563
Court of Appeal of California, Third District,
July 22, 1970.

A junior college student sought to set aside his expulsion and to have any reference to it and to his prior suspension expunged from his record. The lower court granted the requested relief, and the junior college officials appealed.

The student had some position with the student body association whereby he exhibited motion pictures and sold tickets for the pictures. He told the dean that he was planning to invite a group of socialists to the campus, and the dean requested that the student go the the dean's office and fill out some forms. The student declined to do so. After the group arrived, the student went to the dean and told him of their arrival. He was then informed by the dean that he should invite the students to leave and proceed "through channels." When the student again refused the request, he was told that he was violating instructions and should appear one hour later in the president's office. The school handbook made it an offense to violate the instructions of a credentialed person.

The student met with school officials at the appointed hour and was given a three-day suspension. He was, however, allowed to take an examination that fell during that time. He was also placed on disciplinary probation for the next semester. This meant that he would not be permitted to participate in college activities, attend functions, or hold any office, but could go to classes and take examinations. A letter to this effect and setting out the reasons for the action was sent to the student. Later the terms of the probation were modified without request, to permit the student to attend functions, but he could not maintain his position as ticket taker or seller and as movie chairman, or to handle student body money. Shortly thereafter the student told the dean that he had taken books from the lost and found room, sold them, and kept the money. He then refused the request of the dean to attend a meeting in the president's office on the subject. The student also violated the terms of his probation by showing a movie and collecting ticket money. He was then notified by letter that a special meeting of the college board would be held to consider his expulsion for violating the terms of his probation, refusing to attend the meeting, and selling the books. A hearing was held, and the student was expelled.

The student contended that his suspension violated due process since he was not given written notice of the charges against him, advised of his right to counsel and to call witnesses in his own behalf, and written findings of fact were not made. The appellate court held that since the only charge against the student at that time was refusing to obey the order of the dean relative to filling out the forms for the invitation to the socialist students, formal procedures for notice and a hearing were not necessary. The student was aware of what he was charged with and was sent a letter stating why he was disciplined following the meeting with the president. No First Amendment rights of the student were violated, the court said, since the dean did not refuse permission for the socialist students to appear on campus, he merely required that certain forms be filled out. Therefore, that portion of the trial court's finding concerning the lack of due process or the suspension was reversed.

The student also charged that the hearing before the board on the expulsion was biased and prejudiced against him. The appellate court agreed with this contention, and affirmed the holding of the lower court setting aside the expulsion order. The higher court found that there was substantial evidence in the record to indicate that members of the board had discussed the issue prior to the meeting and had already determined to expel the student. Since this decision was made prior to the hearing, the board did not constitute an impartial body. The court said that due process does not forbid the combination of judging and prosecuting in administrative proceedings, but where there is bias and prejudice on the part of the administrative body, its decision will not be upheld by the courts.

The portion of the lower court order setting aside the suspension of the student was reversed, but the holding of the lower court that the hearing on the expulsion violated the rights of the student was affirmed.

Illinois

Whitfield v. Simpson
312 F.Supp. 889
United States District Court, E.D. Illinois,
April 22, 1970.

A black high-school student brought suit to have portions of the Illinois Statutes declared unconstitutional and to force her reinstatement in the high school. The girl had been suspended and later expelled for alleged gross disobedience and misconduct. Prior to the final action of the Cairo board of education expelling the student, notice was sent to her parents requesting them to appear at a meeting of the board to discuss her behavior. They were informed in the same letter that their daughter could be expelled. The evidence was in conflict as to whether or not the father appeared. However, it was agreed that the girl's mother attended the meeting. The student did not attend the board meeting. Following the hearing, the board voted to expel the student for the remainder of the school year. The court held that the specific acts that the student was accused of were well within the definition of gross disobedience or misconduct.

The first charge of the student was that portions of the Illinois Statutes relative to suspension and expulsion were unconstitutional as written and as applied in that they permitted a school board to suspend or expel a student without affording the student due process in the form of notice and a hearing. The student also charged that she was expelled without being afforded the minimal requirements of procedural due process. The court disagreed, noting that the student and her parents were informed of the meeting before the board. The court said that although the two days' advance notice given was short, no request was made for more time to enable the parents to obtain counsel if they desired. The court found that the length of notice was adequate to fulfill due process requirements. The court also found that the student was given an orderly hearing with an opportunity to introduce evidence and that a fair and impartial verdict was rendered. The fact that the student did not appear and offer evidence in her own behalf, the court said, "cannot be attributed to dereliction on the part of the school board."

The student also charged that the statutory terms, "gross disobedience or misconduct," are too vague and overbroad standing alone, to support disciplinary action. The courd did not find this to be so, saying that the language in the statute used to describe the type of conduct which may be the basis for expulsion by school boards was clear and definite of understanding. It would be impossible to use more definite words because of the difficulty of putting into writing within the framework of the English language all of the distinctions necessary for their application. Concluding that the student had not been denied procedural due process and that the statute in question did not run afoul of the due process clause, and was not vague or overbroad, the court dismissed the complaint.

Massachusetts

Grayson v. Malone
311 F.Supp. 987
United States District Court, D. Massachusetts,
May 4, 1970.

A suspended high-school student sought a mandatory injunction against Boston English High School officials, ordering them to reinstate him. He also sought actual and punitive damages. The student initially charged that he was dismissed from school because of his political associations and civil rights activity. He later waived this contention and any claim to actual damages, admitting that there were grounds to justify his suspension. The case proceeded to trial on the contention that the student was not afforded procedural due process in connection with the indefinite suspension and should be awarded punitive damages.

The evidence showed that the student had been suspended for a short period of time early in the school year for disruptive conduct. At a conference attended by the student, his father, the headmaster, and the associate superintendent of schools, it was decided to readmit the student, but he and his father were told that if he was suspended again, readmission would have to be arranged by getting in touch with the associate superintendent. The following month the student was again suspended. The headmaster called the father, advised him of the second suspension and the reasons therefor, and again reminded him that he would have to get in touch with the associate superintendent for redress. Subsequently the student transferred to another high school.

The court found no denial of due process, noting that both the student and his father were expressly told what procedure should be followed for readmission and both refused to follow this procedure; as a consequence they failed to obtain a hearing. The court held that this failure to follow procedure amounted to a waiver on the part of the student of the right to any hearing. Nor was there any basis for awarding actual or punitive damages because of the suspension since the school officials did not act in bad faith or disregard the student's rights. The complaint of the student was dismissed.

Michigan

Davis v. Ann Arbor Public Schools
313 F.Supp. 1217
United States District Court, E.D. Michigan, S.D.,
June 4, 1970.

A suspended junior high-school student brought suit against the school district charging a lack of due process in his suspension and seeking reinstatement and damages. The student had transferred into the Ann Arbor schools from California in September 1969 and from the beginning presented serious problems to the administration. The student was continually truant, missed many of his classes, and was suspected of arson in several small fires in the school building. Repeatedly letters were sent to his mother regarding his conduct, school absences, and poor school work and at least five conferences were held with the boy and his mother. Each time the student promised to do better, but each time he failed to keep his promises. On February 18, 1970, a letter was sent to the mother, suggesting that she withdraw her son from school for the remainder of the semester. The same day the student was caught smoking in school, a violation of the rules. The following day he was suspended for "incorrigible conduct" for an indefinite period. His mother immediately called the school to discuss the suspension.

On March 4, a board meeting was held to consider the student's conduct. He was present with his mother and legal counsel, and all were permitted to speak freely. A week later the board met again and considered the situation in detail, including copies of letters sent the mother, the student's high-school record, and a copy of the report concerning the smoking incident. The board then approved a recommendation of suspension for the remainder of the semester.

Shortly thereafter the student brought this action, alleging that he had been suspended without being given an opportunity to be heard. He asserted that he had been suspended for smoking on school grounds, and that he was suspended "without any semblance of a fair hearing of the type required by due process of law." The court noted that due process has no fixed meaning but can be termed simply as whether a person had been treated with fundamental fairness in light of the total circumstances of the case. In this case the court held that the student had been treated fairly in that he was fully apprised of his various offenses and had been given an informal hearing. The student also complained that his mother was not given written notice of his suspension within five days as set forth in the school guide. The court found that the fact that the mother immediately telephoned the school and discussed the suspension relieved the school district of the necessity of giving written notice. The court found it beyond question that the student and his mother had full knowledge of the reasons for his suspension.

The student further charged that the proceedings before the board of education were lacking in due process because there was no "dialogue" before the board with respect to the charges against him. The court felt that the student envisioned something approaching a full-dress judicial proceeding with cross-examination of witnesses, and said that the law did not require such a procedure for an administrative hearing to satisfy due process.

Without passing upon the reasonableness of the regulations involved, the court concluded that the student was "fully informed of the charges against him and that he was afforded a hearing reasonable under all the circumstances. The school authorities acted properly with constitutional limitations." Finding no lack of due process, the court denied the relief requested by the student.

Minnesota

Anderson v. Independent School District No. 281
176 N.W.2d 640
Supreme Court of Minnesota, April 17, 1970.

The school district appealed from a lower court order granting injunctive relief to a high-school student who had been suspended twice for smoking on school grounds contrary to regulations. The first suspension was in September 1968, at which time the student was reminded of the no-smoking rule and of the fact that repeated violation carries expulsion. In January 1969, the student was again caught smoking in school and again was suspended. The principal's recommendation to the school board to expel the student was made 19 days later. In the intervening time this suit was commenced.

The trial court injunction cancelled the suspension but did not preclude the board from hearing and determining the question of expulsion for cause, namely, violation of the no-smoking rule.

The appellate court ruled that the case was moot because the student was suspended only for the remainder of the 1968-69 school year which was over and because the student had voluntarily withdrawn from school for the 1969-70 school year and was employed full time. The appeal of the school district was dismissed.

Mississippi

Lance v. Thompson
432 F.2d 767
United States Court of Appeals, Fifth Circuit,
October 21, 1970.

A suspended high-school girl sought a preliminary injunction to force her readmission to Greenville high school. The district court denied relief, and the student appealed.

On December 11, 1969, the girl had been involved in a verbal exchange and fight in the school cafeteria. That afternoon the principal conducted a brief investigation by securing written statements from the parties and by interviewing various teachers and students who had witnessed the incident. He then informed the girl and her father of the charge against her and requested that the student go home until he could gather further information. On December 17, the student and her mother were summoned to the principal's office. In separate interviews the principal explained the charge, disclosed the names of witnesses and the content of their testimony, and reviewed the evidence. Neither the student nor her mother chose to say anything in her defense. The mother was then informed that the student would be indefinitely suspended. When she expressed dissatisfaction with this decision, the principal informed her that she could appeal to the school board. Late in February 1970, a hearing before the board was requested and held. However, the student's counsel was sick and did not appear, nor did the girl or her parents. Although the board had expressed a willingness to consider the suspension, the student had made no further effort to exercise her right of appeal to the board.

The student argued before the appellate court that the district court erred in concluding that she was afforded procedural due process during the various suspension proceedings. After a thorough search of the record the appellate court concluded that there was no abuse of discretion on the part of the district court in denying the motion for a preliminary injunction.

New Hampshire

United States v. Wefers
314 F.Supp. 137
United States District Court, D. New Hampshire,
June 9, 1970.

This case involved the prosecution of the president of the student government of the University of New Hampshire for criminal contempt of court. The case began when the student president invited three members of the "Chicago 7" to speak on campus. The speeches were originally scheduled for May 5 from 7:00 p.m. to 10:00 p.m. Following the announcement of the speeches, there was great public controversy as to whether or not the speakers should be allowed on campus at all. The board of trustees of the university decided to permit the speeches but to restrict them to the hours from 2:00 p.m. to 5:00 p.m., fearing greater chance of violence at the later hour. The president of the student government then sought a court order to permit the speeches from 5:00 p.m. until they were finished. The hearing was held the day of the scheduled speeches, and at the close of the hearing, the attorney for the board of trustees informed the court that the speakers would arrive on campus at approximately 3:30 p.m. Since the student leader had told the court that three hours would be sufficient time to conclude the speeches, the court entered an order that the speeches be allowed between the hours of 3:30 and 6:30 p.m. Before leaving the courthouse the student president was informed by his attorney that unless the board of trustees met again and prohibited any speaking after 5:00 p.m., the three could speak after 6:30 p.m. without restriction.

The remaining events of the afternoon indicated that the student did not intend that the speeches start until 7:30 p.m. This was evidenced by his reluctance to accept a copy of the supplemental court order issued after the court was informed that there was misunderstanding about the first order and by his general unavailability. The speakers did arrive at a nearby town about the time that they were expected but did not proceed to the campus until 7:30 p.m. The student president had also informed the waiting crowds that the speeches would not start until that time. Additionally, there were three phone calls from and to other students involved in the planned speeches. Two of these were not received by the student president because of his general unavailability.

The court found that there was no attempt on the part of the student body president to comply with the order of the court. The court said that while there may have been some ambiguity in the order, there was nothing even remotely suggested that the speeches could take place at 7:30 p.m. In fact, in his civil complaint, the student asked that the speeches be allowed to begin at 5:00 p.m. The court found untenable the position of the student that he could not get in touch with the speakers in time, since the evidence indicated that the student could have done so if he chose to. The court found that the evidence established beyond a reasonable doubt that between the hours of 12 noon and 4:00 p.m., the student "willfully and deliberately refused to make any attempt to comply with the order of this Court."

The student asserted that he was not in contempt because the trustees *allowed* the speeches to start after 6:30 p.m., within the terms of the supplemental order, and therefore the student's responsibility had terminated. The court said that the trustees did not *allow* the speeches; rather, the decision of the trustees was to refrain from the use of force to prevent them. This decision, the court said, was forced on the trustees by the student himself in refusing to comply with the court order. It was noted that the speeches occurred the day following the deaths of four students at Kent State University, and the New Hampshire University school officials thought that tensions were already high and that to prevent the speeches would result in violence.

The court lastly considered the role of the student's attorney in the student's conduct and found that his advice at best could be characterized as "based on a strained and highly technical interpretation of the original order." However, advice of counsel is not a defense in a contempt proceeding. The student was found guilty of contempt of court and was sentenced to 20 days in jail or a $500 fine.

New Jersey

R. R. v. Board of Education of Shore Regional High School District
263 A.2d 180
Superior Court of New Jersey, Chancery Division,
February 27, 1970.

A suspended high-school student and the school board were before the court on an order to show cause why the student should not be readmitted to school. On January 20, 1970, the student had engaged after school hours in a scuffle with a neighbor girl; in this scuffle the girl suffered knife cuts. The criminal action against the student had not yet come up for a hearing. The following day the student was suspended from school by the school superintendent until the next meeting of the school board.

On his own initiative, the father had a psychiatrist examine his son. The psychiatrist felt that the boy could return to school without risk to himself or others. Nonetheless, the board of education met and decided that the boy should continue to remain at home, pending further investigation and the outcome of the criminal proceedings against him. Neither the boy nor his parents were notified that the board would consider the suspension nor were they given any opportunity to present their position. The board did decide that the student be furnished with home instruction. However, only minimal instruction was ever furnished because the guidance director stated that he had difficulty obtaining teachers who would go to the student's home unless they could be assured that they would not suffer any violence. On February 18, 1970, again without notice to the boy or his parents, the board voted to continue the suspension.

One question before the court was whether the school officials could deprive the student of his right to attend school because of acts committed off school property and totally unrelated to school activities. The court concluded that school officials have authority to suspend or expel students for events that happen outside school hours "where it is reasonably necessary for the student's physical or emotional safety and well-being, or for reasons relating to the safety and well-being of students, teachers or public school property."

The remaining issue before the court was what procedural due process must be afforded the student. The court noted the importance of education to the student and the statutes of New Jersey providing for compulsory education. In addition the court noted the specific statutes relating to suspension of students, and that while the school board had complied with the literal requirements of the law, the student's constitutional rights to due process were violated by mere literal compliance.

The court, therefore, construed the statutes to require public-school officials to afford students facing disciplinary action the procedural due process guaranteed by the Fourteenth Amendment. The court held that students could be temporarily suspended for a short period of time prior to a full hearing if their continued presence in the school constituted a danger to themselves, other students, faculty, or school property. Students must, however, the court said, be afforded a preliminary, informal hearing on the issue of suspension. At the preliminary hearing, the student should be given the opportunity to persuade the authority that there is a case of mistaken identity or that there is some other compelling reason why he should not be suspended pending the full hearing. The court also set out the minimum requirements of a full hearing, among them a statement of the charges or grounds for the proposed disciplinary action, and a hearing at which the student could present his side of the issue.

Since the student in this case was not given either a preliminary or a full hearing, the court ordered him reinstated immediately and ordered that he be given extra instruction to catch up with his class. If the school officials had reasonable cause to feel that his readmission would be harmful, the court stated, he could be suspended after a preliminary hearing. Following any interim suspension the student would be entitled to a full hearing.

New York

In the Matter of Manigaulte
313 N.Y.S.2d 322
Supreme Court of New York, Special Term,
Suffolk County, Part I, June 18, 1970.

A student sought to prohibit the board of education from conducting a disciplinary hearing relative to her conduct while she was under criminal charges for the same conduct. The girl argued that to defend herself at the school hearing she would have to testify and that therefore her right to remain silent in the criminal proceeding would be abrogated.

The highest state court had previously held that it would be improper for a lower court to grant such a prohibition since the courts may not assume that administrative bodies would violate the rights of individuals in the administrative hearings. Because of this ruling, the court in this case refused to grant the prohibition.

The student also sought to require the board of education to supply a bill of particulars to the charge. The court held that the notice that she received would be factually sufficient if contained in a long form information. Also, the education law requires that the student have an opportunity for a fair hearing on reasonable notice, and the notice of charge given the pupil afforded her such an opportunity. The petition of the student was therefore dismissed.

STUDENT INJURY

Arizona

LaFrentz v. Gallagher
462 P.2d 804
Supreme Court of Arizona, In Division,
December 16, 1969.

A seventh-grade pupil sued his teacher, the principal, and members of the school board as well as the school district for assault and battery allegedly committed by the teacher. The court dismissed the case as to the members of the school board and the principal. The case was tried as to the teacher and the school district and resulted in a jury verdict in favor of these defendants.

The incident from which the suit arose began when the pupil was called out by the teacher on a close play at first base during a softball game. The student alleged that he walked away "kicking the dust" and the teacher grabbed him by the throat and slammed him into the backstop. The teacher's version was that the pupil used coarse language when called out and that the teacher pushed him and told him that his language was improper.

The pupil contended on appeal that the court was incorrect in not allowing in evidence prior similar acts committed against other pupils. The pupil conceded that the evidence was not admissible to prove assault and battery in this case, but the evidence should have been admitted to show knowledge, intent, and malice and for the purpose of showing the right to punitive damages. The court disagreed with these contentions since it was clear that for this purpose such evidence was not admissible.

The court said that it is a well-established principle in an action against a school teacher for damages for battery, that corporal punishment which is reasonable does not give rise to a cause of action for damages against the teacher. There was a conflict in the testimony, and the jury had accepted the version of the teacher. Prior acts of assault upon other pupils at other times and under different circumstances could not be admitted as evidence on the question of whether the act complained of here was for the purpose of discipline and would have no validity to show malice toward the pupil.

Judgment of the trial court was affirmed.

California

Dailey v. Los Angeles Unified School District
470 P.2d 360
Supreme Court of California, in Bank,
June 25, 1970.

Parents of a deceased high-school student brought a wrongful death action against two teachers and the school district. The trial court directed a verdict in favor of the teachers and the school district. The appellate court affirmed (84 Cal.Rptr. 325, 1970) and the parents appealed.

The accident giving rise to this action occurred during the lunch period as the deceased student and three of his friends proceeded toward the gymnasium building where their next class was to be held. They stopped outside the building where the student and one friend engaged in "slap boxing" which is a form of boxing using open hands rather than clenched fists. Although the students appeared to be enjoying the activity and no hard blows were struck, the student fell backwards and suffered a fractured skull which resulted in his death a few hours later.

The parents maintained that the district was negligent in failing to supervise the students during the lunch hour. According to the plan of the school district, the physical education department had general supervision of the gymnasium area. The chairman of that department, who was one of the defendants, testified that while his department had supervision duties in the area, he had never been told to make sure that some particular teacher was to supervise on a particular day. He also testified that there was a teacher on duty in the "gym office" during the lunch period on that day; however, he was eating his lunch and preparing lessons and not sitting in a position to observe the accident.

The sole question on appeal was whether the motion for a directed verdict was properly granted by the trial court. Under applicable case law, the granting of the motion would have been proper if "giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff if such a verdict were given."

Before deciding whether the evidence was sufficient to support a verdict in favor of the parents, the court considered what duty, if any, is owed by the school district to students on school grounds. The court noted that "California law had long imposed on school authorities a duty to 'supervise at all times the conduct of the children on the school grounds and to enforce those rules and regulations necessary to their protection.'" The standard of care required in carrying out this duty, the court said, is that degree of care which a person of ordinary prudence would use under the same or similar circumstances. Lack of supervision or ineffective supervision could, under California law, constitute a lack of ordinary care by those responsible for student supervision. Also, under the California Government Code, a school district is vicariously liable for injuries proximately caused by the negligent supervision.

In the opinion of the court the fact that the student's death was caused by his own boisterous behavior would not preclude a finding of negligence on the part of the school authorities. Adolescent high-school students are not adults and should not be expected to exercise the same degree of discretion, judgment, and concern for the safety of themselves and others as is associated with full maturity.

The court then came to the question of whether the evidence was sufficient to support a finding of negligent supervision. There was evidence that the department head had failed to develop a comprehensive schedule of supervising assignments and had neglected to instruct his subordinates as to what was expected of them while they were supervising. There was also evidence that indicated that the teacher on duty had not devoted his full time to supervising but ate lunch, talked on the phone, and prepared future class assignments. Neither of the two teacher-defendants heard or saw a 10-minute slap boxing match that attracted a crowd of 30 spectators and took place within a few feet of the gymnasium building. The court said that "from this evidence a jury could reasonably conclude that those employees of the defendant school district who were charged with the responsibility of providing supervision failed to exercise due care in the performance of this duty and that their negligence was the proximate cause of the tragedy that which took Michael's life." The fact that another student's misconduct was the immediate precipitating cause does not compel a conclusion that negligent supervision was not the proximate cause of the student's death.

The court concluded that there was evidence of sufficient substantiality to support a verdict in favor of the parents and that the trial court erred in granting the motion for a directed verdict in favor of the school district and the two teachers. That judgment was reversed.

Colorado

Arnold v. Hafling
474 P.2d 638
Colorado Court of Appeals, Division II,
September 9, 1970.

A high-school student and his parents brought suit against a coach and the principal to recover damages for injuries the student suffered at a school outing. The student had broken his leg when he was pushed from a retaining wall by another student. The injury occurred during a high-school lettermen's outing at the coach's mountain cabin. The plaintiffs claimed that the coach and the principal had condoned the activities leading up to the accident and were negligent in their supervision.

The trial court had granted the motion of the coach and the principal for a directed verdict against them based on another Colorado decision denying relief to an elementary-school child hurt on a playground by another pupil. The plaintiffs appealed.

In affirming the judgment, the appellate court said that in the present instance the facts supporting the trial court verdict were even stronger than in the judicial precedent which was correctly applied. In the case at hand the students were between 16 and 18 and it would be expected that they would be more responsible than elementary-school children. Also, in the prior case the primary reason for the teacher being on the grounds was to supervise the children, while in this instance the coach and the principal were present to host the outing. The appellate court agreed with the trial court that the evidence was insufficient to submit the case to a jury.

District of Columbia

Butler v. District of Columbia
417 F.2d 1150
United States Court of Appeals, District of Columbia Circuit,
June 20, 1969; rehearing denied August 15, 1969.

A junior high-school student lost the sight of one eye when he was hit by a sharp object, possibly a piece of type, as he entered printing class. Suit was brought against the District of Columbia, alleging that the school authorities were negligent in their supervision of the classroom and that this negligence was the proximate cause of the student's injury. The lower court directed a verdict for the District at the close of the evidence, and the student appealed.

The evidence showed that the printing teacher was not present at the start of the class because he had been assigned to duty during the lunch period as a hall or cafeteria supervisor under a plan formulated by the principal. The plan was designed to place teachers in positions where supervision was most needed when students were generally out of their classrooms. Students in the printing class were given specific rules of conduct to be observed if the teacher was not present. One of these was that the students were not to throw type.

The court felt that with these rules of conduct the school authorities balanced the need for a teacher to supervise several hundred students in corridors or the cafeteria against the need to supervise 14 students in a classroom for a short period of time. The court concluded that the fact that the teacher was absent from the classroom at the time of the injury did not establish liability for negligence on the part of the school authorities. The judgment of the lower court was affirmed.

Iowa

Sprung v. Rasmussen
180 N.W.2d 430
Supreme Court of Iowa, October 13, 1970.

The Riceville Community School District appealed from the trial court decision in a pupil injury case. The trial court had overruled the school district motion to dismiss the action for failure to comply with the statutory notice provisions. The high-school senior in this case had been injured in physical education class while performing a tumbling exercise. The parties agreed that he was incapacitated by his injuries for 87 days. Notice of the injury was given to the school district 136 days after the accident or 49 days after the student recovered. In response to the suit brought against the school district and the physical education teacher in charge at the time of the accident, the district pleaded the statute of limitations. State law provides that notice must be given within 60 days of the injury and includes a provision stating that "the time for giving such notice shall include a reasonable length of time, not to exceed ninety (90) days, during which the person injured is incapacitated by his injury from giving such notice."

In its appeal, the school district maintained that the duty of giving notice rested on the father of the student and not the student. The appellate court disagreed, noting that the statute expressly imposes on the injured party the duty of giving notice. The school district also maintained that the total allowable time for giving notice was 60 days if the party was not incapacitated and 90 days over-all otherwise, and charged that it was error for the trial court to interpret the statute to allow the injured party up to 150 days to give notice. A literal reading of the provision led the court to conclude that the legislature intended to permit an injured party to defer the service of the 60-day notice of loss or injury for a period of 90 days or such shorter period as the party might be incapacitated. Under this interpretation, a 150-day maximum period was afforded. Since in this case the pupil was incapacited for 87 days and notice was served 49 days later, the appellate court held that notice was served in conformity with the statutory requirement. The decision of the trial court was accordingly affirmed.

Louisiana

Mogabgab v. Orleans Parish School Board
239 So.2d 456
Court of Appeal of Louisiana, Fourth Circuit,
July 15, 1970; rehearing denied, October 5, 1970.

The parents of a deceased high-school student brought a wrongful death action against the parish school board, the head coach, an assistant coach, the principal, the superintendent, the supervisor of the health, safety, and physical education division, and an insurance company. The trial court dismissed the action without written reason and the parents appealed.

The parents alleged that the death of their son resulted from the negligence of the defendants in failing to perform their duty of providing all necessary and reasonable safeguards to prevent accidents, injury and sickness of football players and in failing to provide prompt treatment when such occurs. Although some of the facts were in dispute, it appeared that the student became ill at football practice at 5:20 p.m. and that shortly thereafter was put on the team bus to return to the high school. The boy was laid on the floor of the high school and covered with a blanket. An unsuccessful attempt was made to give him salt water. At 6:45 p.m. his mother was called and she telephoned a doctor who arrived at the school at 7:15. The boy was immediately taken to a hospital where treatment was begun, but his condition worsened and he died at 2:30 a.m. the next day. The cause of death was heat exhaustion and heat stroke.

One of the doctors who treated the student testified that covering a person suffering with heat exhaustion with a blanket is the wrong thing to do and that time is of the essence in such a case and quick treatment is necessary so that the processes caused by the illness do not reach an irreversible state. The doctor did not give a positive answer that the boy would not have died had he received immediate medical attention, but said that his death would have been more unlikely had proper medical treatment been instituted when the boy first staggered and informed the coach that he was ill.

The appellate court said that it was plain that the two coaches present were negligent in denying the boy medical assistance and in plying an ill-chosen first aid, and that the parents had proved this negligence. What was not proved was that the boy would have *certainly* lived if brought to a doctor sooner and for what *precise* period of time the condition remained reversible. The court did not think that the law demanded such flawless precision and said that taken as a whole the record supported the premise that it was more likely than not that the student would have survived with reasonably prompt medical attention.

The court held that the record did not support a negligence charge against the principal, the supervisor of health, safety, and physical education division, and the superintendent since they were unaware of the happenings. The claim against the insurance company was no longer before the court. The court concluded that a claim against the two coaches and the school board had been sustained and awarded each of the parents $20,000, besides funeral and medical expenses. To this extent the judgment of the trial court was reversed.

Station v. Travelers Insurance Company
236 So.2d 610
Court of Appeal of Louisiana, First Circuit,
May 25, 1970; rehearing denied June 30, 1970.

The father of a high-school girl brought suit against the school board and its insurer for injuries sustained by his daughter. The lower court found no cause of action and the father appealed. The girl had been injured while preparing for the judging of science projects. A fellow student struck a match and an open container of alcohol ignited; this caused the girl to suffer serious burns. Suit was brought against the school board and no individual teacher was named. It was alleged that the accident was caused solely by the board's negligence in allowing young students to handle flammable material without proper instruction or supervision and permitting such material to be kept in glass containers.

The school board asserted and the lower court found that a school board is not liable for the torts of a teacher when an error in professional judgment is made. The appellate court found that the doctrine of error of professional judgment was not applicable to this case. All cases cited by the school board in support of its position involved the alleged negligent acts of doctors and nurses in suits against hospitals. The appellate court found that the pivotal issue in each of the cited cases related to a consideration of control and authority over the person charged with the negligence. The appellate court could find no Louisiana cases where this doctrine had been applied to a school teacher.

The next argument of the school board was that it had breached no duty owed to the student, and therefore it was not liable for the injuries sustained. The court noted that numerous Louisiana court cases recognized the liability of a school board for the alleged negligence of a teacher. Accordingly, the judgment of the district court was reversed, and the case was remanded to the lower court for a trial on the merits.

Maryland

Segerman v. Jones
259 A.2d 794
Court of Appeals of Maryland, December 9, 1969.

A fourth-grade teacher left the classroom for a few minutes on school business while the class was engaged in a program of calisthenics. While the teacher was gone, one little boy moved from his assigned place and performed the push-ups in an improper manner so that his feet hit a girl on the head. As a result, the girl's two front teeth were badly chipped. Suit was brought against the boy and the teacher. Suit was dismissed as to the boy, but a judgment was rendered against the teacher, who appealed.

The evidence showed that the exercises were being performed in the children's regular classroom according to directions given on a record with which the children were supposedly all familiar. The teacher had played the record through once for the children to hear and then saw that the exercises were properly under way before departing the classroom. There was also evidence that the boy who caused the injury was a physically active child who required somewhat more supervision than other pupils.

The appellate court concluded that the absence of the teacher from the classroom was not, as a matter of law, the proximate cause of the pupil's injury. The court said that even the teacher's presence could not have prevented the injury, nor was the injury reasonably foreseeable. Rather, the injury was caused by an intervening and wholly unforeseen force—that the boy left his assigned place and did not do the push-ups as he had been instructed to do them.

Judgment against the teacher was reversed.

Michigan

Cody v. Southfield-Lathrup School District
181 N.W.2d 81
Court of Appeals of Michigan, Division 2,
June 26, 1970.

An injured high-school student appealed from the trial court judgment in favor of the school district. The girl had fallen and had broken both arms while performing a gymnastic exercise on a "mini-trampoline" in her physical education class. The school district had raised the affirmative defense of governmental immunity and the trial court had granted the district's motion for summary judgment.

The appellate court found that under the common law doctrine of immunity the school district was immune from liability for its negligent acts while in pursuit of a governmental function. The court then discussed whether conducting the physical education class was a governmental function and concluded that it was, since state law mandated that physical education programs be conducted in the schools and Michigan courts have liberally determined the scope of activities within the physical education program.

However, even if the state was engaged in a governmental function, it was liable by law for torts arising out of a dangerous or defective condition of a public building. In this case the accident occurred in a public building but the appellate court agreed with the trial court holding that since no allegation was made that the "mini-trampoline" was improperly manufactured, negligently erected or dangerously maintained, this exception to immunity was not applicable. The action was based solely on the alleged negligence of the supervising teacher and the school principal.

Finally the appellate court concluded that the fact that the school district carried liability insurance did not preclude the district from asserting the defense of governmental immunity. The court noted that school districts must protect themselves in instances of injuries resulting from motor vehicle accidents and defective buildings where immunity has been statutorily abrogated.

The judgment of the trial court in favor of the school district was affirmed.

Minnesota

Grams v. Independent School District No. 742
176 N.W.2d 536
Supreme Court of Minnesota, April 10, 1970.

An injured high-school student who sued the school district for damages appealed from the grant of summary judgment in favor of the school district. The student had been severely injured in a physical education class while he was engaged in wrestling. He suffered a broken neck with apparent total and permanent disability of his limbs. Eight days after the accident, the boy's father appeared at the administrative offices of the school district to discuss the injury claim. At that time he signed a form prepared by the district, giving the student's name, time and place of accident, and the nature of the injury and other information. At the next regular meeting of the board of education the report of the accident appeared on the agenda.

Summary judgment was granted in the court below because of lack of notice to the school district within the 30-day period required by state law. The issue on appeal was whether notice was served on the governing body of the school district and whether such notice was legally sufficient.

The court found the statutory language required only that notice be presented to the governing body within 30 days of the accident, and that bringing the matter to the attention of the board in an informal manner would satisfy the statute. After a review of many cases involving notice, the court concluded that there was no exclusive mode of bringing notice or agreement on who should receive notice. The court held that service may be made on the governing board of a school district by leaving notice with the superintendent or anyone in charge of the office in his absence. The court also held that the notice signed by the student's father and left at the administrative office of the school district within the time required by law satisfied the requirements of service.

In addition to requiring notice, the state statute also required that the notice set forth the time, place, and circumstances of the injury. The purpose of this requirement, the court pointed out, is to furnish the school district with the nature of the injury or loss so that investigation may be made to determine the truth and merits of the claim. In this case the court held that the notice was sufficient to enable the school district to determine the facts. Further, since three instructors were present at the time the accident occurred, the district had actual notice of the circumstances. Accordingly, the court held that the requirements of the statute were met. The lower court decision was reversed.

Nevada

Kaminski v. Woodbury
462 P.2d 45
Supreme Court of Nevada, December 8, 1969.

A junior high-school student who was injured in industrial arts class brought suit against the board of trustees of the school district and the teacher involved. Summary judgment was granted in favor of the school district, presumably on the ground that notice was not served on the board of trustees within six months of the injury in accordance with statutory requirements. The pupil appealed.

The injury occurred on May 9, 1967. The teacher's immediate supervisors were informed of the accident shortly thereafter. Notice of the claim was sent to the clerk of the state board of examiners and the board of county commissioners of the county on October 17, 1967. In late November 1967, more than six months after the accident, notice of claim was sent to a member of the board of trustees of the school district.

The school district had denied the claim in January 1968, but the letter to the injured pupil did not indicate when the claim was received. There was also a reasonable presumption that the clerk of the state board of examiners received the claim and that it was then referred to the board of the school district.

The court held that whether or not the school district received the notice within the six-month statutory time limit was a question of fact which must be decided before summary judgment could be sustained. The decision of the trial court was therefore reversed, and the matter was remanded to give the parties an opportunity to establish if the notice of claim was served on or before November 9, 1967.

New York

Andrzejewski v. Board of Co-Operative Educational Services
312 N.Y.S.2d 457
Supreme Court of New York, Appellate Division,
Fourth Department, May 14, 1970.

The Board of Co-Operative Educational Services appealed from the decision of the trial court permitting a nine-year-old pupil and his father to file late notice of claims. The pupil was injured while attending class in a school owned by the Hamburg Central School District. A timely notice of claims was filed against the school district but not against the Board of Co-Operative Educational Services which employed the teacher of the class where the accident happened. The pupil and his father claimed that they did not learn that the teacher was not employed by the school district until more than 90 days after the accident.

The appellate court held that under these circumstances, there was a cognizable relationship between the fact that the child was a minor and the failure to file within the 90-day statutory period. Therefore, the motion to permit the child to file a late claim was properly granted by the trial court and affirmed. However, the appellate court found no basis for permitting the father to file a late notice of claim and that portion of the lower court order was reversed.

Brown v. North Country Community College
311 N.Y.S.2d 517
Supreme Court of New York, Essex County,
June 17, 1970.

A community college student was injured when he slipped and fell on ice and snow at the main college campus. Suit was brought for damages, and a copy of the complaint was served on the business manager of the college. This case was before the court on a motion of the college for summary judgment to dismiss the action.

The first ground for dismissal alleged by the college was that the court lacked jurisdiction of the subject matter because the college was part of the State University of New York and any action against it must be brought in the court of claims. The court rejected this ground of defense, holding that community colleges are not part of the state university system.

The second ground was that the court lacked jurisdiction over the college because it was not an entity capable of being independently and individually sued. The college claimed that it was solely an adjunct of its sponsors, the county governments of Essex and Franklin counties, and therefore statutory provisions governing counties with regard to claims must be complied with. It was conceded that no notice of claim was served upon either of the sponsoring counties or upon the board of trustees of the college. It was the opinion of the court that a community college is an independent entity and that compliance with the statutory provisions regarding notice was not a condition precedent to bringing an action. This defense of the college was dismissed.

The final ground alleged by the college for dismissal was that the student had not presented a cause of action. The court said that the student's complaint alleged a "fall-down type of accident" allegedly caused by the negligence of the college, its agents, and employees. This allegation with the charge of personal injuries and damages was sufficient to sustain the complaint. This defense was likewise dismissed. In view of the dismissal of its specific defenses, the motion of the college to dismiss the complaint of the student was denied and the college was given time to file an amended answer.

Kratz v. Dussault
305 N.Y.S.2d 734
Supreme Court of New York, Appellate Division,
Third Department, December 4, 1969.

The Schenectady city school district appealed from an order of the trial court which denied the district's motion to dismiss the summons and complaint of an injured pupil on the ground that the papers were not served within the period specified by law. The pupil and her mother had filed the notice of claim against the school district within the prescribed period after the pupil's injury but had not served the summons and complaint within the statutory period of one year and 90 days after the occurrence of the accident on which the lawsuit was based.

The court found that the intent and purpose of this statute of limitations was to expressly preclude commencement of an action against a school district after the expiration of the time limit. However, the court said it had consistently been held that the provisions of another statute which extended the time within which an action for personal injuries may be brought by a *minor* apply to this statute of limitations. But the suspension of the statute of limitations did not apply to the mother's suit for medical expenses and loss of services of the child. Therefore, the motion of the school district to dismiss as to the mother's suit only was granted on appeal.

Perry v. Board of Education of the City of Lackawanna
312 N.Y.S.2d 640
Supreme Court of New York, Appellate Division,
Fourth Department, June 25, 1970.

The board of education appealed from a trial court order permitting a junior high-school student to file a late notice of claim against the board of education. The boy had been injured at school and a notice of claim was filed with the city of Lackawanna instead of the school board. The wrong filing was attributable in part to misinformation given the attorney by the student's mother. The court held, however, that the failure to effect service on the proper corporate entity was also attributable to the minority of the student which prevented him from ascertaining that the junior high school was operated by the board of education.

Under these circumstances, the appellate court held that it was not an abuse of discretion for the trial court to permit the late filing of the claim.

Young v. City of New York
307 N.Y.S.2d 576
Supreme Court of New York, Appellate Division,
Second Department, January 12, 1970.

An injured high-school student sued the city of New York for personal injuries and medical expenses. The trial court dismissed the complaint after the student concluded the presentation of his case to the jury. The student appealed.

According to the evidence presented by the student, the day of the accident was rainy, and the outside door to the school vestibule had been left open all day. The student slipped and fell on the wet terrazzo floor. Further, other entrances, but not this one, had been supplied with a rubber mat, and the custodian had mopped the floor earlier and was aware that water had accumulated there.

The court held that in light of these facts, the question of whether the city had used reasonable care to prevent an injury or to remedy a dangerous condition was for the jury to determine. The decision of the trial court was reversed and a new trial was granted.

Oregon

Hutchison v. Toews
476 P.2d 811
Court of Appeals of Oregon, Department 2,
November 16, 1970.

An injured high-school student appealed from the lower court judgment, dismissing his suit against the School District No. 4, Jackson County, and the school chemistry teacher. The student had been injured when a cannon fueled by explosives made by the student and a friend exploded prematurely burning both hands of the student. The trial court had dismissed the case based on the school district's defenses of contributory negligence and assumption of risk on the part of the injured student.

It appeared that the injured student and his friend had "badgered" the chemistry teacher for potassium chlorate to use in fireworks experimentation. After refusing several times the teacher gave in and gave the students the powdered chemical. A few days later, the friend, without the teacher's knowledge, took the same chemical in crystalline form from the chemical storeroom. The injured student's complaint charged that the teacher "supplied" him with potassium chlorate. The two students testified that it was the crystalline form of the chemical which was used to make the explosive.

There was also evidence that the students had a booklet from which they were preparing the mixture and that the instructions carried warnings about the dangerousness of the chemical, and that the chemistry teacher to whom they had shown the booklet cautioned them and told them that they should have supervision. The students testified that they knew that the booklet said that the formula for using potassium chlorate was very powerful.

The appellate court concluded from all of the evidence that the injured student had knowledge of the risk involved in the experiment and that he was contributorily negligent as a matter of law. The decision of the trial court was affirmed.

Washington

Bartelson v. Puyallup School District
462 P.2d 912
Supreme Court of Washington, En Banc,
December 24, 1969.

The lower court dismissed a claim for damages against the school district filed on behalf of an injured pupil, and the pupil appealed. The claim had been filed more than a year after the occurrence of the injury despite a state statute which required any claims to be filed within one year.

The pupil argued on appeal that the statute in question was improperly codified in the state statutes and could not be uncovered in a search. The court disagreed, noting that there were references to the claim statute under "Schools and School Districts" in the state code and that a better examination would have disclosed its existence. The court ruled that compliance with the notice provision in the statute was necessary to recover.

The pupil also argued that she should be excused from filing her claim within the statutory time limitation because she was a minor. The court held that since the legislature had failed to relax the requirement as applied to minors, the pupil was not excused from filing her claim within the time limit specified by law.

The decision of the lower court dismissing the case was upheld.

Osborn v. Lake Washington School District
462 P.2d 966
Court of Appeals of Washington, Division I,
Panel Two, December 22, 1969.

A high-school student brought an action against the school district for injuries sustained at school. The court granted the student a new trial because of misconduct on the part of the attorney for the school district, and the district appealed.

The student was injured when a voting machine kept in a school storeroom fell on him, fracturing his leg. The room was unlocked, and the students were unsupervised at the time of the accident. Neither the injured student nor the general student body had previously been instructed to stay out of the storeroom.

The injured student had been adjudged an incorrigible child, and at the time of the accident had been committed to a home for boys. The student's attorney anticipated that such information might be used against the student at the trial, and prior to trial he moved to exclude all such evidence. The court granted the motion and ordered defense counsel to refrain from inquiring into or making any reference to such matters. Despite the order, defense counsel in cross-examination, elicited from the student that he was confined to an institution. Because of this a new trial was granted.

The school district argued on appeal that previous acts of misconduct of the student should have been admissible. The court disagreed, noting that there were eyewitnesses to the incident and, secondly, that there was no evidence that the injured student caused the machine to fall or that it was caused by any delinquent act. Further, his past conduct was not relevant since the character of the student was not in issue. The appellate court found no abuse of discretion on the part of the trial court and therefore affirmed its order granting the student a new trial.

RELIGION/SECTARIAN EDUCATION

Connecticut

Tilton v. Finch
312 F.Supp. 1191
United States District Court, D. Connecticut,
March 19, 1970.

Certiorari granted, 90 S.Ct. 2200, June 22, 1970.

Fifteen Connecticut citizens and taxpayers brought suit for themselves and all others similarly situated, seeking a declaratory judgment that the federal Higher Education Facilities Act of 1963 does not authorize grants to church-related colleges and universities for construction of academic facilities and that if it does, to that extent of the Act and the grants thereunder must be declared unconstitutional under the First Amendment. The defendants were the Secretary of the U. S. Department of Health, Education, and Welfare and other federal and state officials concerned with the administration of the Act. Also named as defendants were four church-related institutions of higher education that had sought and received grants under the Act. A three-judge federal court heard the case.

The first issue was whether the Act authorized the grants to the defendant colleges and universities. By its terms the Act neither included nor excluded church-related institutions but defined an institution of higher education as "an institution which is non-profit, accredited and legally authorized by the state in which it is located to provide a program of education beyond high school." Further, grants were forbidden for the construction of "any facility used or to be used for sectarian instruction or as a place for religious worship" or "any facility which . . . is used or to be used primarily in connection with any part of the program of a school or department of divinity." The court said that these limitations in the act "make it plain that grants for construction of academic facilities to be used in connection with other functions of church-related colleges and universities were contemplated." Also, the court said that the legislative history is conclusive that Congress intended to make the benefits available, for not only did sponsors of the legislation state in the debate that the Act applied to church-related institutions but amendments to deny the benefits of the Act to such institutions were voted down. The court held, on the basis of the entire record, that the government officials had acted in accordance with the provisions of the Act and within the scope of their authority in recommending and approving the grants in question.

The court then considered plaintiffs' claim that the Act and the grants thereunder impaired their constitutional rights. Their primary challenge was that the Act violated the establishment clause of the First Amendment since the grants to church-related institutions constituted government aid to religion. Applying the purpose and effect test of *Abington School District v. Schempp* (83 S.Ct. 1560, (1963)) to the act, the court found that the first requirement, that of a secular legislative purpose, was clearly met. The purpose of the Act, according to the declaration of the Congress, was to increase the student enrollment capacity of the country's institutions of higher education through grants for construction of academic facilities to help provide young people with the greatest possible opportunity for higher education. This declaration was based on findings that there was an urgent need for the construction of such facilities to accommodate expected increases in student enrollments. On the basis of this declaration of policy and findings, the court held that the act had the secular purpose of increasing the student enrollment capacity of colleges and universities, an existing urgent public need, and that the Act did not have the purpose of promoting religion of any kind.

The court held further that the Act also met the second requirement—a primary effect that neither advanced nor inhibited religion. The focus of this test, the court said, is the function which the government is subsidizing, not the nature of the institution receiving the aid. The court observed that this Act was carefully drafted to insure that the grants made to church-related institutions would subsidize the secular rather than the religious functions of such institutions. The Act authorizes grants only for the construction of academic facilities to be used for secular purposes and specifically prohibits grants for the construction of any facility to be used for religious instruction or worship. Accordingly, the court concluded that the taxpayers' claim of impairment of their rights under the establishment clause of the First Amendment was without merit.

The plaintiffs had also claimed that the Act and the grants impaired their rights under the free exercise clause on the ground that they effect compulsory taxation for religious purposes. The court held that since the Act had a secular legislative purpose and a primary effect that neither advanced nor inhibited religion, it could not be said to be taxation for religious purposes. Moreover, the court said, the free exercise clause is not violated unless the legislation can be shown to have a coercive effect on an individual in the practice of his religion and the plaintiffs failed to show any coercive effect on them in the practice of their religion.

The court concluded that the Act was constitutional and that the plaintiff-taxpayers were not entitled to injunctive relief. A judgment was entered dismissing the complaint.

NOTE: On June 28, 1971, by a five to four decision the Supreme Court of the United States affirmed the opinion of the three-judge district court, finding that the Act in question had a secular legislative purpose, neither advanced nor inhibited religion, did not involve excessive government entanglement with religion, and did not inhibit the free exercise of religion. However, that portion of the Act which imposed a 20-year prohibition on the religious use of the facilities constructed with federal funds was declared unconstituional. The court said that to avoid trespass on the First Amendment, the restriction has to last for the useful life of the property. The unrestricted use of valuable property for any purpose after the expiration of the 20-year period would in effect be a gift of value to a religious body. The case was remanded to the district court for a judgment consistent with the opinion. (*Tilton v. Richardson* (91 S.Ct. 2091).

Florida

Banks v. Board of Public Instruction of Dade County
314 F.Supp. 285
United States District Court, D. Florida,
June 26, 1970. Judgment vacated, 91 S.Ct. 1223,
March 29, 1971.

(See page 52.)

Louisiana

Seegers v. Parker
241 So.2d 213
Supreme Court of Louisiana, October 19, 1970;
rehearing denied November 25, 1970.

Certiorari denied, 91 S.Ct. 2276, June 28, 1971.

Louisiana taxpayers filed suit against the state treasurer and state school superintendent, attacking the constitutionality of two acts of the state legislature authorizing the state to purchase secular educational services from teachers employed by nonpublic schools, both sectarian and nonsectarian. The enabling act provided that the state would pay directly to all qualified teachers of approved, nonpublic schools an amount equal to, but not surpassing, that which teachers with similar qualifications in public schools would receive, but that such payments would be made for the teaching of secular subjects only. Of the eligible teachers 78 percent were in religious-related schools and 22 percent in nonsectarian, private schools. The second act authorized the expenditure of $10 million for the purchase of these secular educational services for the 1970-71 fiscal year.

The plaintiffs alleged that the acts violated three provisions of the state constitution and the establishment clause of the First Amendment of the Constitution of the United States. The court considered the legislation only from the viewpoint of whether it violated the state constitution, but because of the similarity of establishment clause of the federal Constitution and one of the provisions of the state constitution, Supreme Court interpretations of the federal clause were used as an aid.

Quoting from Supreme Court Court decisions in *Everson v. Board of Education* (67 S.Ct. 504, (1947)) and *Board of Education v. Allen* (88 S.Ct. 1923, (1968)) upholding bus transportation for nonpublic school pupils and the loan of textbooks, the Louisiana court said that these cases stood for the proposition that legislation affording pupil financial benefits which do not relieve sectarian schools of any of their financial obligations are not violative of the establishment clause even though there is a possibility of indirect benefit flowing to the sectarian schools.

The state officials argued that payment of teachers' salaries falls into the same category as textbooks and transportation found constitutional in the *Everson* and *Allen* cases. The court, to the contrary, found a great difference, concluding from the findings of fact within the act that the legislature found that the sectarian schools are ***obligated*** to furnish teachers and revenue for teachers' salaries for their schools. In fact, the basis for funding nonpublic schools was the legislature's finding that those schools were in a financial crisis that had forced them into a noncompetitive position with the public schools for the employment of qualified teachers. In distinguishing the cited decisions, the court said education can be provided without transportation and books but cannot be accomplished without teachers.

The court said that despite the language in the act as to its purpose and effect, the result would be to transform a single, centralized public school system into a dual one incorporating nonpublic schools. The court found that the purchase by the state of secular services from the nonpublic schools would unavoidably set up confrontations and conflicts over the boundaries between secular and sectarian instruction and would necessitate a program of inspection and monitoring by the state to confine the public funding to secular teaching. For if the state did not intrude upon the administration of the sectarian schools, secularity could not be assured and advancement of religion would ensue. If the state did act zealously to guard the establishment principle and the legislative intent, its entanglement and involvement would impinge upon religious freedom. The court concluded that the legislation was violative of the state constitutional provision of separation of church and state.

The court also ruled that the legislation violated two other provisions of the state constitution. The first of these prohibited the expenditure of public money directly or indirectly in aid of any church, sect, or denomination. The court held that aid channeled through teachers was still aid to religious institutions, for it relieves them of an enormous financial obligation. The court construed this provision as prohibiting aid to a religious institution. The court also found that the acts in question violated the state constitutional provision which prohibited appropriation of public funds to any private or sectarian school. This would also prohibit aid to nonsectarian private schools covered under the acts.

The court concluded that the purchase of secular teacher services by payment of sectarian teachers' services was aid to religious institutions and was not exempted by the Supreme Court decisions in *Everson* and *Allen*. Therefore, the legislation was unconstitutional under the three aforementioned provisions of the state constitution. A judgment was rendered permanently restraining the defendant state officials from administering, acting under, or expending funds under the two contested acts.

NOTE: The Supreme Court of the United States declined to hear an appeal from this decision.

Maine

Opinion of the Justices
261 A.2d 58
Supreme Judicial Court of Maine, January 15, 1970.

The House of Representatives of the state of Maine was considering legislation involving aid to nonpublic schools. Prior to the enactment of the legislation, questions concerning its constitutionality were asked of the highest Maine court.

The legislation perceived a crisis in elementary education brought on by increasing costs and the possibility that nonpublic schools would close, placing an increased burden on the local public school districts. The proposed act provided for the purchase of secular education services from private schools by the local administrative unit. As a condition of purchasing these services, the administrative unit would first have to determine that the closing of a nonpublic school would either have an adverse effect on the unit's property tax or cause a burden on the public school system by creating a shortage of or overcrowding of existing public-school classroom space. Payment was provided for teachers' salaries, textbooks, instructional materials, and supplies. The stipend was to be limited to the actual cost to the nonpublic school of providing education in the secular subjects.

The first question before the court was whether the proposed legislation violated the establishment clause of the First Amendment of the Constitution of the United States or the comparable section of the state constitution. Three justices with one other concurring answered the question in the affirmative. Applying the *Schempp* test, which demands that legislation to be constitutional have both a purpose and a primary effect that neither advances nor inhibits religion, the justices found that "the purpose and primary effect of . . . [the proposal] is to subsidize those sectarian schools, the closing of which would cast an increased student burden on the public school system . . . . Such subsidization by its assuring the continuance of the school, assures the continuance of the purpose for which the school exists,—advancement of the faith it represents. The net result of all of this is for the State to invade the sectarian school system in a manner which violates the independence to which it is constitutionally entitled. The result is not the neutrality required by the Constitution."

In the view of the Maine Supreme Court, the recent federal district court decision in *Lemon v. Kurtzman* (310 F.Supp. 35) on a similar Pennsylvania law was not pertinent. The Pennsylvania statute provided for the purchase of secular educational service only in mathematics, modern foreign languages, physical sciences, and physical education. The proposed Maine legislation was not so limited. The declared policy of the former statute was based on parental freedom to choose nonpublic educational resources. The latter justified itself on the threatened closing of nonpublic schools because of financial need. Financial benefit to the nonpublic school was inferential under the Pennsylvania statute and expressly and directly solicited under the proposed Maine statute.

The two justices who felt that the first question should be answered in the negative believed that the proposed legislation fulfilled the test for permissible aid laid down in the *Schempp* case on the basis that the proposal had both a secular legislative purpose and the primary effect of neither advancing nor inhibiting religion.

The second question asked of the court was whether the proposed legislation violated the free exercise clause of the First Amendment. All justices answered in the negative. On the face of the act no discrimination appeared nor did the court feel that any could be presumed.

The court as a whole also agreed that the delegation of authority to the school districts had sufficient standards so as not to violate the state constitution's ban on delegation of legislative powers.

The final question asked was whether the proposed legislation violated that section of the Maine constitution relating to the establishment of public schools. The court ruled unanimously that the section did not prevent the promotion of education by other constitutional means.

The court added a caveat in which it said that the section of the proposed legislation which limited aid to schools in existence as of January 1, 1970, to be of doubtful constitutionality.

Massachusetts

Opinion of the Justices
258 N.E.2d 779
Supreme Judicial Court of Massachusetts,
May 11, 1970.

The State Senate of Massachusetts submitted to the highest state court the question of the constitutionality of proposed legislation providing for the purchase by the state of secular educational services from nonpublic schools. The bill under consideration would pay to nonpublic elementary and secondary schools the "reasonable cost" of providing instruction in language arts (English), mathematics, modern foreign languages, physical science, physical education, vocational education, and business education. Reasonable cost was defined to include the actual cost to the nonpublic school of the teachers' salaries, textbooks, instructional materials, and standard educational testing. This would constitute a major portion of the total school expense for the nonpublic schools.

The state court considered the question only from the standpoint of whether the purchase of the secular educational services from nonpublic schools would violate the state constitution. The pertinent portion of Article 46, section 2, of that document provides that "no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political subdivision thereof for . . . aiding any school . . . whether under public control or otherwise, wherein any denominational doctrine is inculcated, or any other school . . . which is not publicly owned and under the exclusive control . . . of public officers . . . authorized by the commonwealth or federal authority or both." The court ruled that the unequivocal language of this provision compelled it to advise the state senate that such substantial assistance to a nonpublic school from public funds amounted to "aiding" as the term is used in the state constitution, and that if enacted, the proposed legislation would be unconstitutional.

The court said there could be no doubt that the explicit language of the constitution was intentional, as may be seen from the debate on the article in the constitutional convention at the time it was adopted. The language was unquestionably designed, the court said, to preclude entirely aid to nonpublic institutions from appropriated public funds, with minor exceptions. The court also noted that applicable court opinions and executive interpretations of the constitutional provision have consistently treated it as prohibiting aid from appropriated funds to any nonpublic institution. The court concluded that the constitutional provision constituted a binding restraint on the court to declare the proposed legislation unconstitutional.

Opinion of the Justices
259 N.E.2d 564
Supreme Judicial Court of Massachusetts,
June 4, 1970.

(See case immediately above.)

The House of Representatives of Massachusetts submitted questions concerning the constitutionality of proposed legislation to the highest court of the state. The legislation in question would authorize a two-year program of financial assistance for all school children, including those attending private schools. The proposed bill would accomplish this by appropriating $100 annually to each pupil attending an elementary or secondary school accredited by the state board of education to defray part of the cost of his education. In no event would any allotment to a private-school pupil exceed the charge for the lesser of the annual tuition charges allocable to subjects normally taught as part of the public-school curriculum or the average cost of educating a pupil in the local public school system. The allotment to a pupil attending a private school could not be used to subsidize courses of religious doctrine or worship. The allotment to a private-school pupil would be in the form of a voucher drawn on the state treasurer and endorsed by the pupil and by the authorized school official.

The declared purpose of the legislation was "that the minimum educational development of every resident elementary and secondary pupil in the commonwealth serves the public purpose of the commonwealth." The first question asked of the court concerned the constitutionality of this language. The court said that although popular education is a public purpose, the acceptance of the declaration in the bill "does not mean that the purpose may be achieved by enacting further provisions which violate . . . [the state constitution]."

The second question asked an opinion on the constitutionality of the voucher system as it related to nonpublic school pupils. The court referred to its opinion of May 11, 1971 (see case above), concerning proposed aid to nonpublic schools and said that opinion was controlling. Although it seemed to the court that the proposed legislation now before it involved an indirect form of aid to nonpublic schools, the court was of the belief that the bill if enacted, would have in substance the same practical effect as the measure it recently considered relative to the purchase of secular services from nonpublic schools. Therefore, the court answered that the voucher allotment to pupils in nonpublic schools would be unconstitutional under Article 46, section 2, of the state constitution which provides that no appropriation of public funds may be authorized for the purpose of aiding any nonpublic school.

Having answered that the voucher system as it related to nonpublic-school pupils was unconstitutional under the state constitution, the third question was whether section 2 of Article 46 is violative of the First and Fourteenth Amendments of the Constitution of the United States as denying parents their share of the tax funds if they choose to send their children to nonpublic schools. The court was of the opinion that there was no deprivation of equal protection of the laws since all children had equal access to the public schools. The court said that "a parent has no constitutional right to exemption from taxes for the support of schools or other public services merely because he does not make use of them." The answer to the third question was no.

The final question inquired whether an allotment voucher on behalf of children attending public schools to a municipality for deposit in its general fund violated the state constitution. The court declined to answer this general question of constitutionality but did state that it observed no violation of the state constitution in respect of payments on account of children attending public school.

Michigan

In re Legislature's Request for an Opinion
180 N.W.2d 265
Supreme Court of Michigan, October 5, 1970.

The Michigan legislature requested an opinion on the constitutionality of a recently enacted statute providing for aid to nonpublic schools with an appropriation of $22 million for the 1970-71 school year. The law provided for the state department of education to purchase from nonpublic schools, educational services in secular subjects at a cost not to exceed 50 percent of the salaries of lay teachers teaching secular subjects in the nonpublic schools. After the 1971-72 school year, the percentage would increase to 75 percent. The sum appropriated by the legislature was limited to 2 percent of the state and local expenditures for public education and was further restricted to certified lay teachers of secular subjects teaching from textbooks meeting criteria required of the textbooks used in public schools. The reason for the act was a finding by the legislature that large numbers of children were being educated in nonpublic schools and that the increasing costs of education were impairing the quality of the secular education being received by these children. The legislature declared it to be the public policy of the state that the public good and general welfare require that state appropriations be extended to provide opportunities for quality secular education to nonpublic school children.

The Michigan court first considered whether the statute violated the free exercise and establishment clauses of the First Amendment of the federal Constitution. The Michigan court noted that the Supreme Court had upheld laws providing for textbooks and bus transportation for nonpublic-school children and the "only cases in which state educational programs have been held violative of the Free Exercise or Establishment Clause by the United States Supreme Court are those involving religious instruction or exercises *in public schools.*" The state court then applied the test for permissible legislation as set out in *School District of Abington Township v. Schempp* (83 S.Ct. 1560, (1963)). Under this test, for legislation to be permissible, there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

Applying the first part of the test—a secular legislative purpose—to the instant case, the court observed that it was concerned only with the legislative purpose, not the sectarian purposes of nonpublic schools. The court said that the legislature had spoken of its desire to foster, improve, and advance the quality of secular education, wherever offered, as an integral element of the public welfare. Since it was beyond dispute that sectarian schools pursue the dual goals of religious education and secular instruction and that parents have the legal right to send their children to sectarian schools, the court ruled that the state's interest in the manner in which sectarian schools perform their secular education function was a proper legislative concern. The court also noted that the financial crisis in the sectarian schools has caused a number of these schools to close, and that these closings were adding to the public schools' financial educational crisis. The court therefore concluded that the purchase of services of certified lay teachers teaching secular subjects in eligible schools constituted a secular legislative purpose.

The court then turned its attention to the second part of the *Schempp* test, that of whether the primary effect of the legislation either advanced or inhibited religion. If either were the case, the statute would be unconstitutional. Reviewing the provisions of the act, the court noted that the act did not generally invest the state with any new powers nor invest the eligible schools with any new duties. Sectarian schools have long been subject to state inspection and control over most nonsectarian aspects of their existence. The court found only three aspects of the act which could be denominated as conditions and those dealt with the implementation and enforcement of the act itself. The court did not perceive from the operation of these new but narrowly drawn provisions any unnecessary or excessive government entanglement. The court accordingly concluded "from the nature and operation of the act under consideration, that the primary effect of this legislation neither advances nor inhibits religion."

The next issue before the court was whether the legislation violated the Michigan constitution. The court could find nothing in the state constitution which expressly prohibited the purchase of services of lay teachers teaching secular subjects in sectarian schools. Nor could the court construe the legislation as supporting "a place of religious worship." Another provision of the state constitution provided: "No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose." The court interpreted this provision as not invalidating "incidental benefits," saying that "to adopt a strict 'no benefits, primary or incidental' rule would render religious places of worship and school completely ineligible for all State services. There is no evidence, furnished or imaginable, that the people intended such a rule when they adopted this provision of the Constitution." Furthermore, the court felt that to adopt this strict construction would conflict with the constitutional provision which guarantees that no person would have his rights, privileges, and capacities diminished or enlarged on account of religious beliefs.

The court concluded that the legislation conformed to the federal and state Constitutions and was therefore constitutional.

NOTE: The decision above was rendered before the Michigan electorate approved a referendum amending the state constitution to prohibit aid to parochial schools. In January 1971, the Michigan Supreme Court ruled that the adoption of the amendment was valid despite certain technical defects in the petitions to place the amendment on the ballot (*Carmen v. Hare*, 185 N.W.2d 1).

At the same time, the Michigan Supreme Court in another decision, *In re Proposal C (The School District of Traverse City v. Kelley*, 185 N.W.2d 9) upheld as constitutionally valid that portion of the adopted amendment which reads: "No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school." This provision, the court ruled, prohibits the purchase, with public funds, of educational services from a nonpublic school. Therefore, the statute authorizing such purchase and heretofore ruled valid was declared unconstitutional as of December 19, 1970, the effective date of the amendment. However, the court struck from the amendment the language which prohibited the use of public funds "at any location or institution where instruction is offered in whole or in part to such non-public school children." This language, in the opinion of the court, contravened the freedom of religion principle and the equal protection clause of the federal Constitution.

The court also ruled on a number of other issues. Among these, the court interpreted the amendment as not prohibiting shared-time instruction offered at either a public or a private school or on leased premises, provided public-school authorities control the subject matter, the personnel, and the premises, and provided that the courses are open to "all eligible to attend a public school." Also, that the amendment does not prohibit auxiliary services and driver training which are general health and safety services, wherever the services are offered; and that the amendment does not interfere with the distribution of federal funds under ESEA for education in Michigan.

Montana

State ex rel. Chambers v. School District No. 10
of the County of Deer Lodge
472 P.2d 1013
Supreme Court of Montana, July 28, 1970; rehearing
denied August 27, 1970.

A taxpayer of the school district sought a writ to prohibit the school district from collecting a levy or from spending the proceeds to employ eight teachers as full-time employees of the school district to teach in a parochial high school. The lower court granted the relief, and the school district appealed.

The school district and the taxpayer characterized the two issues before the court differently. The school district saw the first issue to be whether the state and federal constitutions prohibited the school board from employing teachers to provide the standard course of secular education to resident students of the school district for the reason that the students were enrolled in a parochial high school. As stated by the taxpayer, this issue was whether the state and federal constitutions prohibited the school district from making a special tax levy for the purpose of employing and paying teachers to teach students enrolled in a parochial school on the premises of that school. As phrased by the school district the second issue was whether the free exercise clause of the First Amendment was violated by the lower court order prohibiting the expenditure for teachers' salaries solely because the students who would receive the benefit of the program attended a parochial school. The taxpayer saw this issue as whether the school district had exceeded its statutory authority by proposing the special levy.

It was the contention of the school board that the Catholic high school was an integral part of the public and private educational system in the county and that since it carried a sizeable portion of the county's educational load and complied with the standards set by the superintendent of public instruction, that it pursued a valid and valuable secular function in providing secular education. Further, the proposed levy for the purpose of hiring the teachers for the Catholic high school had a valid public purpose, to achieve the secular education of the students. The taxpayer countered by arguing that the expenditure of the funds was an obvious violation of the principle of separation of church and state.

A provision of the state constitution reads in part: "Neither the legislative assembly, nor any county, city, town, or school district, or any other public corporations, shall ever make directly or indirectly, any appropriation . . . or to aid in the support of any school, academy, seminary, college, university . . . controlled in whole or in part by any church, sect or denomination whatever." Based on this provision, the court held that the school board was prohibited from making a levy for or expending funds for the employment of teachers to teach in a parochial school. In so holding, the court observed that the high school in question was owned, operated, and controlled by the Roman Catholic Church and that the school district had no control over the school even though it complied with the laws with respect to the instruction necessary to be given. The school must of necessity, the court said, supplement this instruction with those required by the church. In view of this aim of the church to permeate all subjects taught with the doctrines of the church, the court continued, "If teachers were to be furnished at public expense to a parochial school, it would not be possible to determine where the secular purpose ended and the sectarian began."

With regard to the second issue, whether the lower court order prohibiting the levy operated to deprive the students at the Catholic school of their First Amendment rights by depriving them of public educational benefits solely because of their religion, the court was of the opinion that the taxpayer was correct in his argument that the school district had acted in violation of its statutory authority. The applicable statutes provided that expenditures of funds or special levies were to be for the sole benefit of the public schools of the district. Since unquestionably the Catholic high school was not a public school of the district, the school board was without statutory authority to spend or to levy funds for the operation of the school.

The appellate court concluded that the trial court was correct in prohibiting the school board from collecting or spending the additional levy for teachers' salaries in the parochial school since such procedure was not permissible under the statutes. The judgment of the lower court was therefore affirmed.

New Jersey

State Board of Education v. Board of Education of Netcong
270 A.2d 412
Supreme Court of New Jersey, November 9, 1970.

Certiorari denied, 91 S.Ct. 1253, April 5, 1971.

The Netcong Board of Education appealed from the trial court holding (262 A.2d 21) that its program setting up a period for "the free exercise of religion" was unconstitutional. The program had been authorized by a schoolboard resolution and was implemented by having exercises in the gymnasium immediately prior to the formal opening of school. Students who wished to attend met in the gymnasium, and a student volunteer read the "remarks" of the chaplain from the *Congressional Record.* The choice of the material was up to the student volunteer who could also make additional remarks concerning such subjects as love of neighbor, brotherhood, and civic responsibility. At the conclusion of the reading, the students were asked to meditate for a short period of time on the material that had been read or anything else that they desired.

This action had been brought by the state board of education, the state commissioner of education, and the state attorney general, after attempts to get the local board to rescind the resolution had failed. The trial court had determined that the "remarks" constituted a prayer rather than the "free exercise of religion" and as such violated the establishment of religion clause of the First Amendment. An injunction was issued to restrain the continuation of the program.

On appeal, the state supreme court held that the program in the Netcong schools was not different from the programs in *Engel v. Vitale* (82 S.Ct. 1261 (1962)) and *School District of Abington Twp. v. Schempp* (83 S.Ct. 1560 (1963)) which the Supreme Court of the United States held to be in violation of the establishment clause of the First Amendment. The judgment of the lower court was therefore affirmed.

NOTE: The Supreme Court of the United States declined to hear an appeal in the case.

West Morris Regional Board of Education v. Sills
265 A.2d 162
Superior Court of New Jersey, Chancery Division,
April 28, 1970.

(See page 90.)

New York

Frain v. Baron
307 F.Supp. 27
United States District Court, E.D. New York,
December 10, 1969.

(See page 55.)

Pennsylvania

American Civil Liberties Union v. Albert Gallatin Area School District
307 F.Supp. 637
United States District Court, W.D. Pennsylvania,
December 19, 1969.

The American Civil Liberties Union and other organizations and individuals, including two pupils of a Pennsylvania school district, sought to enjoin the district from conducting or observing religious programs in the schools. They contended that the reading of a Bible passage and the recitation of the Lord's Prayer constituted a violation of the First Amendment. All parties to the suit, except the pupils, were dismissed by the court because they failed to present evidence that they were aggrieved parties.

The Bible readings and the prayer recitation were installed by a motion made at a meeting of the school board. The evidence indicated that the vast majority of the pupils in the district and their parents desired that such a program be established. The program was conducted by pupils during school sessions either over the school public address system or in individual classrooms.

The pupil-plaintiffs argued that the practice was unconstitutional under the Supreme Court of the United States decision in ***School District of Abington Township v. Schempp*** (83 S.Ct. 1560 (1963)). That decision declared unconstitutional a Pennsylvania law that provided that "at least ten verses from the Holy Bible shall be read without comment, at the opening of each public school on each school day." Although the practice of religious readings instituted in the Albert Gallatin School District was a result of a school-board motion rather than a state law, the court found that "the purpose of the present motion was as equally effective as if it had been of a higher order of legislation."

The court also found no merit in the fact that the majority of the residents of the school district desired such a program, saying that the constitutional right of a single individual may not be sacrificed as against the will of the majority.

Accordingly, the motion of the board of education was declared unconstitutional and an injunction was granted against the school district restraining it and its agents from proceeding with any Bible reading or prayer recitation programs on school premises by virtue of the school-board motion. However, the court stated that nothing in the order was to be construed as prohibiting pupils in the free exercise of religion, or from prohibiting the use of any books or works as educational, source, or reference material, in the ordinary, personal observance by a pupil at any prescribed time that did not interfere with the school schedule.

Lemon v. Kurtzman
310 F.Supp. 35
United States District Court, E.D. Pennsylvania,
November 28, 1969.

Certiorari granted, 90 S.Ct. 1354, April 20, 1970.

A three-judge federal court heard challenges by individual and organizational plaintiffs to the constitutionality of the 1968 Pennsylvania Nonpublic Elementary and Secondary Education Act. Suit was brought against state officials and various nonpublic schools that would benefit under the Act. Before the court was the motion of the defendants to dismiss the suit for lack of standing and for failure to state a claim upon which relief could be granted.

The Act in question empowered the state superintendent of public instruction to contract with sectarian and nonsectarian nonpublic schools for the purchase of secular educational services. All purchases of secular educational services were to be at actual cost of the teacher salaries, textbooks, and instructional materials. All purchases were to be limited to courses in mathematics, modern foreign languages, physical science, and physical education. As a condition for payment the state superintendent must approve all textbooks and instructional materials used and the pupils must achieve a satisfactory level of performance in standardized tests. Within five years after the date of the Act all secular educational services for which reimbursement is sought must be rendered by teachers holding state certification equal to that required for public-school teachers. The program was to be financed by funds drawn only from the tax proceeds of state horse racing and harness racing.

In its legislative findings and declaration of policy in enacting the statute, the state legislature had determined that a crisis existed in elementary and secondary education owing to rapidly rising costs and school population with consequent demand for more teachers and facilities, and that 20 percent of the pupils in elementary and secondary schools in the state attended nonpublic schools. The legislature further found that education constitutes a public welfare purpose and that nonpublic schools, by providing education in secular subjects, contribute to the achievement of this public purpose. The legislature therefore concluded that it had a governmental duty to support the purely secular objectives of nonpublic education.

The first issue before the court involved the standing of the plaintiffs to bring this action. The organizational plaintiffs alleged that they were organizations established for the purpose of either maintaining the separation of church and state or preventing racial discrimination. The court dismissed the organizational plaintiffs as parties because it could perceive no personal stake or adverse legal interests of these plaintiffs which demonstrated their standing as parties to the suit.

The individual plaintiffs asserted standing under the religious clauses of the First Amendment and under the equal protection clause of the Fourteenth Amendment. Additionally, one plaintiff alleged that he had paid an admission tax to a Pennsylvania race track. The other individual plaintiffs did not allege such payment. The court quoted from *Flast v. Cohen* (88 S.Ct. 1942 (1967)) which established two criteria for taxpayers' standing to sue: (a) the taxpayer must establish a logical link between his status and the type of legislative enactment attacked, and (b) the taxpayer must establish a connection between his status and the precise nature of the constitutional infringement alleged. The court ruled that the plaintiff who had paid the tax had satisfied these requirements under the First Amendment and had standing to sue. As to the other plaintiffs who alleged that they had not paid the admission fee to a race track because to do so would require them to pay tax for the support of religion which would violate their rights of conscience, the court ruled that they also had demonstrated standing for the purpose of challenging the Act under the First Amendment.

The individual plaintiffs also sought to challenge the Act under the Fourteenth Amendment, alleging that the schools which would be the recipients under the Act intentionally discriminate in the selection of their pupils and/or teachers or are *de facto* segregated by race or religion. However, none of the individual plaintiffs alleged that his children had applied for and had been denied admission to any of the schools by reason of race or religion. The court, therefore, ruled that since they had not alleged a personal stake in the case, they had no standing to challenge the Act under the equal protection clause.

The court then considered the motion of the defendants to dismiss the action for failure to state a claim. The exact question presented was whether the purpose or primary effect of the Act on its face or in the necessary effect of its administration was to advance or inhibit religion. Plaintiffs argued that the purpose and primary effect of the Act was the advancement of religion. In considering this argument, the court reiterated the declaration of public welfare purpose of the legislature and said that support for this declaration was found in the specific findings of the legislature regarding the percentage of children attending nonpublic schools and the financial crisis in these schools. Furthermore, the legislature recognized the potential financial burden on the state treasury and the long-range impairment of education that would result if these nonpublic schools should close because of lack of funds. The court refused to accept that argument of the plaintiffs that because the vast majority of nonpublic schools which would contract for the purchase of secular educational services were sectarian schools, the act would support religion. Quoting from previous Supreme Court decisions that "religious schools pursue two goals, religious instruction and secular education," the district court was of the belief that the state may aid the secular function rather than the sectarian function of private schools in the public interest of education within proper confines without participating in an involvement in religion forbidden by the First Amendment.

The court did not find that either the primary or the necessary operative effect of the statute advanced religion. The court said that this statute was quite unlike those situations where an attempt is made to interject religion into the public schools. "On the contrary, the statute is limited not only to secular subjects but to a limited number of *specific* secular subjects peculiarly unconnected with and unrelated to the teaching of religious doctrines. The statute is further limited and confined to the purchase of services at cost." The court did not view the First Amendment as requiring an absolute separation of church and state but rather as requiring neutrality. In this instance the court concluded that the prerequisites to receiving governmental funds for the purchase of secular educational services were designed to maintain this required neutrality. Consequently, the plaintiffs' claim under the establishment of religion clause of the First Amendment was dismissed.

The plaintiffs also claimed that they were denied the free exercise of religion and forced by the taxing power to contribute to the support of sectarian schools. Finding no allegation as to what the particular religious beliefs of the plaintiffs were or how the Act coerced them in the practice of their religion the court dismissed the allegation. The last attack alleged that the Act constituted compulsory taxation for the support of religious educational institutions. The court said that even assuming for the sake of argument that such taxation was compulsory, in view of its holding that the Act did not advance or support religion, the tax was not for the support of religion.

Accordingly, the three-judge court granted the motion of the defendants to dismiss the complaint of the plaintiffs.

NOTE: On appeal, the Supreme Court of the United States on June 28, 1971, reversed the decision of the district court. The Court held that the act was unconstitutional under the establishment and free exercise clauses of the First Amendment because the "cumulative impact of the entire relationship arising under . . . [the statute] involves excessive entanglement between government and religion" (91 S.Ct. 2105).

Rhode Island
DiCenso v. Robinson
316 F.Supp. 112
United States District Court, D. Rhode Island,
June 15, 1970.

Certiorari granted, 91 S.Ct. 142, November 9, 1970.

Rhode Island taxpayers challenged the constitutionality of the state salary supplement act before a three-judge federal court. The named defendants were state officials involved in the administration of the act. In addition a couple with children in a parochial school and several teachers eligible for aid under the act were permitted to intervene.

The statute in question opens with a statement that its general purpose is to implement the established state policy of providing "a quality education for all Rhode Island youth." This is followed by a legislative finding that 25 percent of the elementary-school children in the state attend nonpublic schools, and that because of the numbers enrolled, these schools are vital to the state's educational effort; and that the rising cost of teachers' salaries makes it difficult for these schools to maintain their traditional quality. The specific purpose of the act was to assist these schools in providing salary scales that would enable them to obtain and retain teaching personnel who meet recognized standards of quality. To accomplish this, the legislature appropriated funds to pay up to 15 percent of the salaries of teachers of secular subjects in nonpublic elementary schools. A nonpublic school was defined as a nonprofit school whose average per-pupil expenditure on secular education did not exceed the average for the state's public schools. In addition, to qualify for the aid, the teacher must have a certificate, teach a course similar to that taught in a public school with textbooks approved for use in the public schools, and agree not to teach a class in religion. It was undisputed that all the teachers who had applied for aid under the act were employed by Roman Catholic schools.

The court noted that the evidence at the trial corroborated the legislature's finding of a financial crisis in nonpublic education but indicated that it was largely confined to the Catholic schools. Approximately 95 percent of the elementary-school children attending nonpublic schools attended Catholic elementary schools. The financial crisis in these schools stemmed from the fact that the schools were having to rely more and more on lay faculty rather than religious faculty. This necessitated significantly higher salaries for the lay faculty than would be necessary for the religious faculty. Additionally the increasing salary levels in the public schools made it more difficult for the Catholic schools to recruit teachers. The salary supplement act was intended to bring the salary schedule for lay teachers in the Catholic schools closer to the salary schedule paid to public-school teachers.

At trial the parties went into the structure of the Catholic school system. The taxpayers' evidence attempted to show the close financial and pedagogical connection between Church and school. The intervenors' testimony explored the teaching of secular subjects in these schools. The court found implicit in the findings of fact that the diocesan school system is an integral part of the religious mission of the Catholic Church. It was not, the court said, "that religious doctrine overtly intrudes into all instruction. Rather the combined conveniences of ready access to church and pastor, homogeneous student body, and ability to schedule throughout the day a blend of secular and religious activities makes the parochial school a powerful vehicle for transmitting the Catholic faith to the next generation." It also seemed clear to the court that good secular teaching was essential to the religious mission of the schools.

The court said that these determinations pointed to two ultimate facts. On the one hand, the court found that the statute would have the significant if temporary effect of aiding the quality of secular education in the state's Catholic elementary schools. But on the other hand, it was clear to the court that the statute gave significant aid to a religious enterprise.

With these findings in mind the court turned to the central issue of whether the salary supplement act violated the First Amendment. The taxpayers claimed that the act infringed on the free exercise of their religion by forcing them to pay taxes for religious purposes, but the court dismissed this claim because of failure to offer testimony concerning their religious beliefs or a showing of how the act itself coerced them in the practice of their religion.

The main thrust of the plaintiffs' case was that the act violated the establishment clause of the First Amendment. The dispute at the trial revolved around the standard to be applied and the interpretation of the standard. Both parties focused their arguments on the purpose and effect test of *Schempp* which holds that for legislation to be constitutional there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. With the first part of the test, the determination of purpose, the court had little difficulty, for the purpose of the statute was to provide quality education for all Rhode Island youth, those in the public and nonpublic schools alike. The court found this to be a legitimate legislative concern and also found nothing in the history of the act to suggest that the purpose was other than that declared.

The parties differed as to the definitions to be used in the second part of the test. The taxpayers argued that "primary" means "essential" or "fundamental," while the defendant state officials and the intervenor argued that it meant "first in order of importance." The court stated that the problem of definition was critical, for as already noted, the act had two significant effects: it aided the quality of secular education and it provided support to a religious enterprise.

To solve the problem of the definition, the court looked to the refinement of the *Schempp* test as stated in *Walz v. Tax Commission of New York City* (90 S.Ct. 1409, 1970) where it was phrased as "whether particular acts in question are intended to extablish or interfere with religious beliefs and practices or have the effect of doing so." The focus is on whether the statute fosters "excessive entanglement" between the government and religious institutions. Judging by this standard, the court found two dangers in the legislation here in question. First, the act authorized a subsidy that must be annually renewed. If the grant were constitutional, the court said it would find it difficult to distinguish a 50 or 100 percent subsidy of teachers' salaries or a percentage subsidy of the total cost of secular education such as Rhode Island already provides in its public schools.

Secondly, the court said that significant state subsidies would inevitably provide significant limitations on the freedom of the Catholic schools. The increased administrative involvement between church and state that would be required under the act and the inquiries into the teaching would limit the freedom of these schools to set their own curriculum. The court concluded that the necessary effect of the legislation was not only substantial support for a religious enterprise "but also the kind of reciprocal embroilments of government and religion which the First Amendment was meant to avoid." Therefore, the court held that the salary supplement act resulted in excessive government entanglement with religion and thus violated the establishment clause of the First Amendment.

The remaining issues to be settled involved the claims of the intervenors. The intervening Catholic school teachers claimed that the equal protection clause would be violated if the act were to be restricted to apply only to teachers in nonpublic secular schools since secular teachers in denominational schools would be discriminated against. The court said that this was hypothetical especially since all of the applicants for the subsidy were teachers in Catholic schools.

The claim of the parent-intervenors was that they felt conscience bound to send their children to parochial schools because of lack of religion in public schools and if the quality of the secular education in these Catholic schools fell too low, they would have to ignore the dictates of their conscience and send their children to public school. To avoid this result, they argued that the free exercise benefits which flow from aid to parochial schools should prevail over the establishment clause values protected by strict separation. The court rejected this argument on the ground that the First Amendment does not require affirmative state action to accommodate personal evaluations when society at large has accepted the premise that religious and secular education can be successfully separated.

The plaintiff-taxpayers were granted the requested declaratory judgment that the Rhode Island salary supplement act was unconstitutional insofar as it authorized aid to teachers employed by denominational schools.

NOTE: On June 28, 1971, this case with *Lemon v. Kurtzman*, was decided by the Supreme Court of the United States. The statute was declared unconstitutional because of excessive entanglement with religion. (91 S.Ct. 2105)

South Carolina

Hunt v. McNair
177 S.E.2d 362
Supreme Court of South Carolina, October 22, 1970.
Judgment vacated, 91 S.Ct. 2276, June 28, 1971.

A South Carolina taxpayer contested the constitutionality of the Educational Facilities Authority Act passed in 1969 by the state legislature and sought to enjoin the defendants, state officials and the Baptist College at Charleston, from proceeding under authority of the Act. The trial court had denied relief, and the taxpayer appealed. On appeal, the state supreme court adopted the decision of the trial court with addenda.

Under the provisions of the Act, the Budget and Control Board of the state acting as the Educational Facilities Authority was authorized to provide financing for institutions of higher education by the issuance of revenue bonds payable solely out of the revenues of the Authority derived from the particular project for which they were issued and secured by a mortgage on the project. The defendant college had petitioned the Authority for and obtained preliminary approval for the issuance of revenue bonds for the purpose of refinancing obligations of the college. This refinancing was permissible under the Act. In return, the college would convey land and facilities to the Authority which in turn would lease the land and facilities back to the college at a rental sufficient to meet the interest and principle payments on the bonds. Upon payment of all of the bonds, the college would reacquire the land and facilities.

The first challenge to the Act by the taxpayer was that legislative action should serve a public purpose and that this refinancing was a private purpose. The lower court cited the stated purpose of the Act which was to provide a measure of assistance to institutions of higher learning to enable them to assist youth in achieving the required level of learning and development of their intellectual and mental capacities, and to provide sorely needed facilities and structures to accomplish this aim. The lower court held that since secular education is universally acceptable as a proper public purpose, if the "general public benefit is the dominant interest served, constitutional demands are not offended, even though the aid inures to the benefit of a private institution." The appellate court added that the argument that the financing was to be used to pay off debts already incurred rather than to construct new facilities and, therefore, no public purpose would be served, was not sound. That court said that refunding and refinancing serve a public purpose, for the ability of the college to provide education to its students is inseparable from its fiscal welfare.

In his second attack on the constitutionality of the Act, the taxpayer charged that the credit of the state was being pledged or loaned to a private corporation in violation of the state constitution. Two South Carolina cases were cited in support of this argument. The trial court noted that both cases had denied the validity of bonds issued for a private group because they were payable out of the proceeds of taxation. The Act in question here requires that the bonds be paid solely from the revenues received from the participating institution. Additionally, the Act specifically provides that all bonds issued thereunder must carry a statement that neither the state nor the Authority shall be obligated to pay the bonds or the interest on them except from the revenues of the project for which the bonds were issued. Therefore, since the only funds pledged were the lease rentals to be received from the college, the trial court ruled that the state's credit could not be adversely affected and the act was not in violation of the state constitutional provision.

The taxpayer then contended that the Act violated the due process clause of the state constitution insofar as it permitted the expenditure of public moneys for the benefit of a private institution. The trial court pointed out that no public money was to be expended since the entire cost was to be financed through the sale of bonds payable by the participating institution. It was also contended that the college and other institutions which would use the Act would be granted special privileges in violation of the privileges and immunities sections of the state constitution and that those who did not qualify under the act must inevitably pay a higher rate of interest because the interest on the bonds issued by the Act would not be subject to income taxation. The trial court said that this argument overlooked the basic object of the Act which was to assist institutions of higher learning in the construction, financing, and refinancing of their projects which in turn results in the benefit to the people of the state. The appellate court added that in a previous decision it had held similar legislation constitutional.

The last challenge to the Act was that the option granted to the defendant college to purchase the land and facilities at a nominal value violated the public policy of the state and violated the state constitution inasmuch as it permitted the donation of the property to the college. The trial court found that no property of the state was involved since the state would acquire, at no cost, title to the land and facilities subject to certain conditions in the contract, one of which was an option in favor of the college to reacquire the property. In view of its holding above that the credit of the state was not involved, the trial court ruled that the credit of the state could in no way be viewed as aiding the college.

The appellate court also dealt with the argument that the legislation violated the state constitution with respect to the establishment of religion and the free exercise thereof. The court said that having held that neither the credit nor the property of the state was involved, it followed that the constitutional provision was not violated.

The judgment of the trial court holding the legislation constitutional was affirmed.

NOTE: The Supreme Court of the United States vacated the judgment and remanded the case for reconsideration in light of its decisions in the *Lemon* and *Tilton* cases.

Tennessee

Caldwell v. Craighead
432 F.2d 213
United States Court of Appeals, Sixth Circuit,
September 25, 1970.

Certiorari denied, 91 S.Ct. 1617, May 3, 1971.

(See page 57.)

Virginia

Vaughn v. Reed
313 F.Supp. 431
United States District Court, W.D. Virginia,
Danville Division, May 15, 1970.

Fathers of children attending the Martinsville public schools brought suit to enjoin the religious education programs being conducted in the elementary schools. For many years a private religious education group had sent teachers into the public schools to conduct religious classes once a week. The regular teacher was replaced for that period while the pupils whose parents had signed permission cards attended the class. Other children were excused and had a study period. The school board maintained that the program did not contravene the First Amendment because it taught the children about religion rather than indoctrinating them.

The court pointed out the controlling authority in this suit to be *Illinois ex rel. McCollum v. Board of Education* (68 S.Ct. 461 (1948)) where under similar facts the Supreme Court held the practice unconstitutional. In that case the Court said, "Here not only are the state's tax-supported public buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory school machinery. This is not separation of Church and State." The district court found the facts in the instant case came within the holding in *McCollum*.

The court said that certain modifications must be made in the program to bring it into constitutional bounds. The mere fact that certain pupils are permitted to leave the classroom, the court continued, raises the question whether the pupils are being indoctrinated rather than taught about religion. The court noted that if the course is taught within constitutional limits, attendance of all children should be required. For if the course is necessary, it is neccessary for all children not just those whose parents approve. Additionally, the fact that teachers were paid and controlled by the religious group suggested that the state was aiding religion in violation of the establishment clause of the First Amendment. The better procedure would be, the court said, for the school board to hire and control the teachers. Finally, the teachers must conscientiously refrain from any action which would amount to indoctrination or practice of religion.

The court sustained the position of the plaintiffs that no program of religious education should be conducted in the public schools which employs material or practices that would amount to an indoctrination of religion. The court held that a program that encompassed all pupils, controlled by the school authorities, and practiced without indoctrination of the pupils was constitutional, and if the school authorities wished to have a program, they must comply with these guidelines.

West Virginia

State ex. rel. Hughes v. Board of Education of the County of Kanawha
174 S.E.2d 711
Supreme Court of Appeals of West Virginia,
April 14, 1970. Appeal dismissed, 91 S.Ct. 2274,
June 28, 1971.

(See page 90.)

TRANSPORTATION

New Jersey

West Morris Regional Board of Education v. Sills
265 A.2d 162
Superior Court of New Jersey, Chancery Division,
April 28, 1970.

A regional board of education, two members of that board, and a taxpayer brought suit against the attorney general of New Jersey and other state officials seeking a declaratory judgment that the school bussing law was unconstitutional. The law in question required school districts that provide bus transportation for public-school children to also transport children attending private, nonprofit schools, not more than 20 miles from their homes. Plaintiffs alleged two grounds for relief. The first was that 91.4 percent of all nonpublic school children attend schools affiliated with the Catholic Church and that therefore the statute tends to establish religion contrary to the First Amendment of the federal Constitution.

Before this action came to trial, two other state lower courts had declared this statute constitutional in similar cases against an asserted violation of the establishment clause of the First Amendment. This court adopted the conclusions of these two cases and held that the statute was not violative of the First Amendment.

The second contention of the plaintiffs was that the statute violates the equal protection clause of the Fourteenth Amendment because the classification of children benefited by the statute is arbitrary and discriminatory. They cited six categories of children excluded from the operation of the act and maintained that these excluded children were denied equal protection. The plaintiffs asked that if the health, welfare, and safety of *all* school children in the state are the underlying motive of the statute, why should not *all* school children, no matter where they live, receive the benefits of the statute?

The court first reviewed the constitutional principles involved. The federal Constitution commands that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." This requirement, the court pointed out, has been judicially interpreted as requiring all persons within a class reasonably selected to be treated alike. A classification is reasonable if it rests upon some ground of difference having a real and substantial relation to the basic object of the statute or on some relevant consideration of public policy. In addition to the federal constitutional provision several New Jersey constitutional provisions came into focus. One relates to the perpetual fund for the support of education and requires that "the income thereof . . . shall be annually appropriated to the support of free public schools, *for the equal benefit of all people of the State* . . . ." Another section provides that "the Legislature may, within reasonable limitations as to distance to be prescribed, provide for the transportation of children within the ages of five to eighteen years inclusive to and from any school." The court also noted that 75 percent of the funds for the transportation were supplied by the state, the rest was local funds.

Applying both the state and federal constitutional provisions to the six categories of children that the plaintiffs claimed were not included in the statute, the court found that the first group, those attending out-of-state schools, were not similarly situated as those benefited and their exclusion was permissible. The second exclusion, children living outside the 20-mile limit, was also found permissible since the state constitution specifically permitted reasonable limits on distance. The third category of claimed unconstitutional exclusion was children attending profit-making schools. As to this, the court found the record to be deficient since the court had not been presented with any evidence that such schools existed or that any pupils attending such schools had been denied transportation. The fourth and fifth categories comprised children who lived in districts where only handicapped or vocational school children were transported. The court said that these children were in special schools for special needs and did not fall within the same classification as other children. This exclusion was therefore constitutional.

The sixth category comprised pupils attending private or parochial nonprofit schools who lived in districts which provided no transportation for public-school pupils. The court held that this classification constituted a denial of equal protection under the federal Constitution. The court cited many examples of children living across the street from each other who were treated differently because they lived in different school districts. Since it was unable to find a rational distinction between these children that would justify different classifications, the court declared the bussing statute violated the Fourteenth Amendment.

The court held further that the state constitutional provision that required that school funds be used for the benefit of all of the people of the state was violated by the bussing statute. In so holding, the court said that it was "obvious that the 75% contribution from state funds to some nonpublic school students, and not to others similarly situated, violates this section."

West Virginia

State ex rel. Hughes v. Board of Education of the County of Kanawha
174 S.E.2d 711
Supreme Court of Appeals of West Virginia,
April 14, 1970. Appeal dismissed, 91 S.Ct. 2274,
June 28, 1971.

Two cases, consolidated in this appeal, involved the right of children attending parochial schools to demand transportation to those schools on buses operated by the county boards of education. In both cases suit was brought by the parents of children attending nonpublic schools; one case involved the school board of Kanawha County; and the other, the school board of Marion County. Both boards provided bus transportation at public expense to public-school children whose schools were more than two miles from their home. However, they refused to provide transportation to any children attending nonpublic schools. The parents sought a court order to compel the boards of education to provide transportation for their children to the nonpublic schools. They cited a state statute which they maintained mandated this transportation, and claimed that the refusal of the school boards to comply constituted a denial of rights under the federal and state constitutions.

The cited statute granted authority to county boards of education to "provide at public expense adequate means of transportation for *all children of school age* who live more than two miles distant from school by the nearest available road . . . ." The state attorney general had interpreted this provision to mean that a school district which provides transportation for public-school pupils must also provide transportation for parochial-school children under the same rules and regulations. The county school boards involved in this suit were the only two which did not comply with this ruling.

The court found that the statutory language was clear and unambiguous and not subject to interpretation. It ruled that the only discretion permitted the local boards under the statute was whether to supply transportation, and once this discretion was exercised affirmatively, the boards of education were not at liberty to discriminate among children of school age.

The court then considered whether certain constitutional provisions rendered the statute unconstitutional. The court stated that school buses are, in a great measure at least, "maintained and operated in order to protect the health, safety and welfare of the students who are transported thereon." Since this was the case, the court was of the opinion that the denial to parochial-school children the right to the benefit of transportation on buses operated for public-school children denied the parochial-school children equal protection of the laws as guaranteed by the Fourteenth Amendment.

The next constitutional question was whether the establishment clause of the First Amendment and certain provisions of the state constitution were violated by transportation of parochial-school pupils. The court held that the statute when applied to the transportation of children attending parochial schools did not violate the establishment clause of the federal Constitution. Rather, the court held that "the denial to children attending Catholic parochial schools of equal rights of bus transportation accorded to children attending public schools deprives Catholic children and their parents of their right of religious freedom in violation of the provisions of the First Amendment of the Constitution of the United States and, even more clearly in violation of the comprehensive provisions of . . . the Constitution of West Virginia."

The court was also of the opinion that the transportation of nonpublic-school pupils did not constitute an expenditure of public funds for private purposes in violation of the state constitution. The court noted that parochial schools are subject to the same standards, rules, and regulations as are public schools and provide for secular education of children that the county public school system would be forced to provide if the Catholic schools did not exist.

The court granted the order requiring the two county boards of education in question to provide transportation to nonpublic-school pupils attending schools in the county of which their parents were residents.

NOTE: The Supreme Court of the United States dismissed the appeal in this case for want of jurisdiction.

MISCELLANEOUS

Alabama

Scott v. Kilpatrick
237 So.2d 652
Supreme Court of Alabama, June 18, 1970.

A high-school student who was found ineligible to compete in athletics sought and obtained a preliminary injunction to allow his participation. The Alabama High School Athletic Association (AHSAA) appealed.

The student had transferred schools from Martin to Parrish of his own accord in the spring of 1969 without changing his residence. That summer his parents moved to Cordova, and he again changed schools. The principal of Cordova high school, in furnishing an eligibility list to AHSAA, stated mistakenly that the student had moved to Parrish and then to Cordova. On this information AHSAA informed the high school that there would be no problem as to the student's eligibility to play football for Cordova high school. Following the first game a protest was filed as to the student's eligibility. After an investigation, an Association official found that the student was ineligible for football because of the AHSAA rule that a student who transferred to his home school from one that did not serve the area in which he resided must wait one year before becoming eligible. Cordova high school appealed this ruling to the district board of the Association without success.

The purpose of the long-standing rule on eligibility was to prevent recruitment of high-school athletes by other high schools. The Association promulgating the rule was a voluntary one to which the high schools of the state belonged.

The decision of the lower court in favor of the student was apparently based on the fact that AHSAA first informed Cordova high school that the student was eligible to participate in athletics. However, this was based on incorrect information. In view of this the higher court found the later declaration of ineligibility to be justified. The trial court had also found that the right of a student to play football was a property right in that many college scholarships would be offered to a good player. The state supreme court overturned this finding and held that the speculative possibility of acquiring a college scholarship furnished no basis for a finding that the student had been deprived of any property right. The higher court concluded that the lower court was in error in not granting the motion of the AHSAA to dissolve the preliminary injunction. The judgment was therefore reversed.

Arkansas

Pickings v. Bruce
430 F.2d 595
United States Court of Appeals, Eighth Circuit,
August 6, 1970.

Students at Southern State College appealed from the district court dismissal of their suit against college administrators seeking to lift restrictions placed upon a student organization, Students United for Rights and Equality (SURE). The organization had been founded by a small bi-racial group of students to seek better understanding among members of all races, nationalities, and religions.

Shortly after the group was chartered by the college, five black female students sought to attend Sunday services at an all-white church off campus. They were asked to leave, and the incident was reported to SURE. The members then voted to authorize the writing of a letter to the pastor of the church, setting forth SURE's understanding of the incident, advising that the action of the church was un-Christian, and requesting an explanation. A copy of the letter was sent to the president of the college. The college president was critical of those involved in the incident, asked the student who had written the letter to resign from his office in SURE, and asked both faculty advisors to the organization who had approved the letter to resign as advisors. SURE was then placed on probation for the remainder of the year with the implied terms being that the group would limit its activities to campus.

A few months later SURE invited a couple active in civil rights to the campus to show a movie. The day before the scheduled appearance, the president learned of the invitation, decided that the appearance would substantially disrupt the campus, and requested SURE's president and two new faculty advisors to cancel the invitation. They refused, and the appearance of the couple was made without incident.

Two days later SURE's charter was temporarily suspended, pending a review and a final decision on the disciplinary action to be taken against the organization. Suit was then brought. The trial court found that the students should not have sent the letter to the church, should have cancelled the speaker invitation since it was likely to cause disruption, and that the students had not been denied any constitutional rights.

On appeal, the higher court held that the students' First Amendment rights to freedom of speech and association were violated. The court stated that the college administrators had no right to prohibit SURE from expressing its views on integration to the church or to impose sanctions on the members or advisors for expressing these views. Such statements might increase tension within the college and between the college and the community, but this fact, the court continued, could not serve to restrict freedom of expression.

The district court had justified its conclusion that the speakers' appearance would be disruptive on three findings. The first was that SURE was on probation at the time the invitation was issued. The appellate court said that this could not serve as a justification since the probation itself was a violation of the students' constitutional rights, and in any event the probation applied only to off-campus activities. Second, the district court concluded that "disruptive activities" were under way on campus at the time the invitation was extended. The appellate court found no evidence in the record to support this conclusion. The last finding of the district court was that the speakers (a) had a record and reputation for causing disturbances and (b) had caused trouble on another state college campus. The appellate court found no support for the first conclusion and very little support for the second. Upon the entire record the appellate court held that the administration of the college could not have reasonably concluded that the appearance of the speakers would be disruptive, and that the administration had no right to demand that the invitation be withdrawn nor to impose sanctions when it was not.

The decision of the district court was reversed and the suspension and probation of SURE ordered removed. The appellate court also directed that any existing orders prohibiting students or faculty who participated in either incident from holding office in SURE or serving as an advisor be rescinded.

Connecticut

Healy v. James
311 F.Supp. 1275
United States District Court, D. Connecticut,
April 24, 1970.

Students at Central Connecticut State College (CCSC) brought suit against administration officials and members of the board of trustees, claiming deprivation of their constitutional rights. The students had attempted to establish a local chapter of Students for a Democratic Society (SDS) on the campus. Following the normal procedures, they submitted a written statement of the purposes, names of officers, and proposed organization of the group. They also stated that the local group would not be under the dictates or owe allegiance to the national SDS. The application was referred to the Student Personnel Committee which voted 6 to 2 to recommend to the college president that the chapter be given official campus recognition. However, the college president disapproved recognition because it was his judgment that the formation of a local chapter of SDS "carries full and unmistakable adherence to at least some of the major tenets of the national organization. . . . The published aims and philosophy of the Students for a Democratic Society, which included disruption and violence, are contrary to the approved policy . . . of CCSC." The president said further that the submitted request for recognition in no way clarified why, if the group intended to follow the established policy of the college, it wished to become a local chapter of an organization which openly repudiates such a policy.

The students did not challenge the college regulations for approval of organizations but claimed that the president went outside the application and arbitrarily attributed aims and purposes to the local chapter which were not included in the application without first affording them a hearing. This lack of hearing, the students claimed, was a denial of due process.

In determining whether or not the president exceeded the bounds of due process in going outside the application to consider factors which he regarded as factual and relevant, the court noted that in judicial decisions dealing with rights of student social organizations, it is generally recognized that a college may exclude or closely regulate such organizations in the furtherance of its academic activities as opposed to its social or other extracurricular activities. However, a political organization is entitled to greater First Amendment protection than a social one. State colleges and universities are not at liberty to adopt unduly vague regulations nor may they enforce reasonable specific regulations arbitrarily. A student has the right to exercise his constitutionally protected freedoms so long as he does not infringe materially or substantially with the requirements of appropriate discipline or the rights of other students.

The court said further that no student college group is entitled *per se* to official college recognition, but that once a college allows student groups to function on campus, constitutional safeguards must operate equally among all groups that apply, and this requires adequate standards for recognition and their fair application. As to the procedural application of existing standards at issue here, the court concluded that a student organization may not be excluded from campus recognition on the *ex parte* findings of the recognizing authority, where the findings have no basis in the organization's application for recognition. Where ambiguity exists in the application and such ambiguity, if resolved against the student group, would result in nonrecognition, due process requires that a hearing be held and that the students seeking to organize the group be given an opportunity to be heard. The court found a patent ambiguity in the application of the students in that it stated that the students wished to form a local chapter of SDS, yet specifically represented that the local group would not be under the dictates of the national organization.

The court held that denying the group recognition without a hearing was a violation of due process. The college was directed to hold a hearing within 30 days at which the student-plaintiffs would be afforded an opportunity to be heard and would be entitled to cross-examine witnesses. If substantial evidence was offered at the hearing to the effect "that the proposed club has among its aims and purposes, the philosophy of violent activism, then the college administration would have the lawful right to refuse approval of the new club and thus refrain from conferring upon it the status of official campus respectability."

Florida

Hargrave v. Kirk
313 F.Supp. 944
United States District Court, M.D. Florida,
May 7, 1970.

Certiorari granted, 91 S.Ct. 143, November 9, 1970.

Florida taxpayers brought a class action under the equal protection clause of the Fourteenth Amendment, attacking the constitutionality of the "millage rollback act." This legislation provided that any county that imposes on itself more than 10 mills in *ad valorem* property taxes for educational purposes will not be eligible to receive state minimum foundation program funds (MFP) for the support of the county education program. The taxpayers sought to enjoin the defendant state officials from enforcing the statute.

A single-judge district court had dismissed the suit, and the taxpayers appealed. The Court of Appeals reversed that decision and remanded the case with directions that a three-judge court be convened to hear the constitutional issues.

Florida public schools are financed by state and local tax money. The MFP funds are appropriated by the state and distributed to the counties. The local tax money consists of county millage, imposed by the school board and cannot exceed 10 mills, and a district millage which must be authorized by a vote of the freeholders. Under the millage rollback act, the aggregate of the county millage and the district millage cannot exceed 10 mills. The passage of the act required 24 counties whose voters had authorized additional taxes to roll back their taxes to the 10-mill limit for the 1968-69 school year or lose state MFP funds.

The taxpayers contended that the legislation violated the equal protection clause of the Fourteenth Amendment because the limitation is fixed by reference to a standard which relates solely to the amount of property in a county and not to the educational needs of the county. The taxpayers argued that the act promoted no compelling state interest and was arbitrary and unreasonable.

Considered first by the court was the defendants' argument that the federal court should abstain from considering the case pending the outcome of a similar state court proceeding. This the court declined to do, saying that the fact that a state remedy is available is not a valid basis for federal court abstention.

The first defense of the state officials was that "the difference in dollars available does not necessarily produce a difference in the quality of education." The court said that this abstract statement must give way to proof to the contrary in this case. Wide disparities would exist with the rollback legislation. It is clear, the court observed, that the act "prevents the poor counties from providing *from their own taxes* the same support for public education which the wealthy counties are able to provide." The next argument of the officials that the relief sought cannot remedy the evil alleged was also rejected. The court responded that this argument did not meet the constitutional issue under the equal protection clause. Secondly, the proven facts contradicted the possibility posed by the defendants that school boards would not levy taxes in excess of 10 mills.

The last argument of the officials was that counties were not forbidden to levy taxes over 10 mills because they could forego their MFP funds, and this fact avoids the constitutional issue. The court disagreed, saying that the state may not grant a benefit subject to a condition that violates the equal protection clause.

Having disposed of the defendants' arguments, the court considered if the act violated the Fourteenth Amendment. Considering first whether there was a rational basis for the legislation, the court could find no interest of the state of Florida that was served by preventing its poorer counties from providing as good an education for their children as its richer counties. The court held that the act imposed discriminatory treatment without a rational basis for the distinction and therefore was unconstitutional.

The court did not believe the case of *McInnis v. Shapiro* (293 F.Supp. 327, aff'd 89 S.Ct. 1197, 1968) was applicable. That case held that the Fourteenth Amendment did not require a state to expend money for schools only on the basis of the educational needs of the pupils. The court found that case distinguishable in that the Florida act prevented local boards from adequately financing education. The complaint was not that the state permitted boards to spend less but that it required them to spend less. Plaintiff-taxpayers in this case were asking the state to let them *raise* more money *locally*. In *McInnis* the plaintiffs wanted the *state* to *give* them more money.

The court issued the injunction requested by the taxpayers, prohibiting state officials from withholding MFP funds from any county by virtue of the provisions of the millage rollback legislation.

The Supreme Court of the United States agreed to hear an appeal from this decision.

NOTE: On March 8, 1971, the Supreme Court, after hearing oral arguments, but without deciding the federal constitutional issue, vacated the order of the district court and remanded the case to that court. The Supreme Court held that the lower court should not have rejected the state officials' argument that the federal court should abstain from considering the case in deference to the proceedings filed in state court where the millage rollback act was being challenged on grounds that it violated the provisions of the state constitution. The High Court also noted that an insufficient record was developed in the court below regarding the manner in which the financing program was to operate. (*Askew v. Hargrave*, 91 S.Ct. 856)

Idaho

Paulson v. Minidoka County School District No. 331
463 P.2d 935
Supreme Court of Idaho, January 16, 1970.

A father and his two sons sued to compel the school district to furnish a transcript to the older boy who had graduated from the county high school. The younger son was still a student at the school. The case arose over a policy of the school district which required students to pay a $25.00 fee, half of which was allocated to textbooks and the other half of which was used for extracurricular activities.

Each year the boys refused to pay the fees. This failure did not affect their right to attend class. They were furnished textbooks free of charge and until the 1968-69 school year they were given a student activity card. However, they were not furnished a yearbook nor allowed to purchase one. Upon graduation, the older boy was furnished a cap and gown and presented with a diploma. However, when he applied to college, the school district would not furnish a transcript. This suit was then brought. The lower court ruled that the fee-charging practice was unconstitutional and ordered that the transcript be furnished. The school district appealed.

The Idaho constitution provides that there be established and maintained "a general, uniform and thorough system of public, free common schools." The school district contended that "common schools" did not include "high schools." Rejecting this contention, the court held that public high schools, including the Minidoka County High School are common schools within the meaning of the constitution and, therefore, by constitutional command must be "free."

The district had argued that the high school was free despite the mandatory $25.00 fee. Half of the fee was to be used for extracurricular activities; however, to receive a transcript the student must pay the entire fee. The court said that a "levy for such purposes, imposed generally on all students whether they participate in extracurricular activities or not, becomes a charge on attendance at the school." Such a charge, the court held, contravenes the constitutional mandate that the school be free. But the court said that the school could set fees to cover the cost of such activities to be paid by students who wished to participate in them.

The court then considered the portion of the fee allocated to textbooks. The court stated that textbooks are a necessary element of a school and are thus indistinguishable from other educational expense items such as school building maintenance and teachers' salaries. Therefore, the court held that the district could not charge students for such items because of the constitutional mandate that the common schools be "free."

The school district also argued that it was providing "free high school educations," which was all the constitution required and that it was merely making the availability of the transcript contingent upon the payment of the fee. The court noted that the state constitution did not provide for a "free high school education" but rather for "free common schools" and that the entire product received from the school by the student must be free. The court said that the ability to obtain a transcript without cost is a necessary incident of a high-school education. It ruled that the district could charge a reasonable fee based upon actual average cost for subsequent transcripts, but the district had a clear legal duty to provide the initial one free of cost.

The judgment of the lower court was affirmed.

Louisiana

Estay v. Lafourche Parish School Board
230 So.2d 443
Court of Appeal of Louisiana, First Circuit,
December 30, 1969.

A married high-school student appealed from the judgment of the trial court dismissing his application for a preliminary injunction. The student sought to compel the school district to allow him to participate in extracurricular activities, specifically football. The school board had a policy that classified married students as special students and barred their participation in extracurricular activites.

The student argued that the regulation contravened the equal protection clause of the Fourteenth Amendment, and furthermore, since there was no state prohibition against married students participating in extracurricular activities nor any express authority given to the school board to adopt such a policy, the regulation could not stand.

The school board maintained that it had authority to take the action; that the rule was reasonable in that it was designed to discourage rather than prohibit early marriages because of the tendency of married students to drop out before completing high school, and that the student had not been discriminated against because the rule had been fairly and uniformly applied in every instance.

The court noted that full and final authority for the operation of public schools is granted to the local boards of education by state law. The board therefore had the authority to make the regulation in question. The court found that the regulation bore a reasonable relationship to the lawful end of promoting the legislative objectives committed to the board's charge. Further, the classifications resulting from the policy rested on sound and reasonable bases, and the regulation had been given uniform application in every case. Hence, the regulation met constitutional requirements. The judgment of the trial court was affirmed.

Mitchell v. Louisiana High School Athletic Association
430 F.2d 1155
United States Court of Appeals, Fifth Circuit,
August 5, 1970.

The Louisiana High School Athletic Association (LHSAA) appealed from judgments entered in three consolidated cases in the district court, enjoining LHSAA from enforcing certain rules pertaining to eligibility. The suits were brought by parents of three high-school athletes who were found ineligible to compete in interscolastic athletics in their senior year. The challenged rule provided that beginning with the sixth grade, a student who repeated a grade that he had passed would lose his fourth year of eligibility in high school. This rule did not apply to students who had actually failed a grade.

The three students in this case had all passed eighth grade but elected to repeat the year. When they were found ineligible for athletics in their senior year of high school, suit was brought charging that the rule was unconstitutional as a denial of due process and equal protection of the law. The lower court agreed with this contention because the rule was not properly publicized in elementary and junior high schools and the rule granted eligibility to students who failed a grade but denied the same to students who repeated a grade for other valid reasons.

The appellate court found the contention that LHSAA failed to give notice of the requirement to elementary and junior high schools to be without merit. The court held that the privilege of participating in athletics was not one of the "rights, privileges and immunities" secured by the Constitution. Therefore, the Fourteenth Amendment was not applicable, and the matter was outside the protection of due process.

The appellate court also rejected the contention that students who repeated grades for reasons other than failure were the victims of "invidious discrimination." It held that the classification created by the eligibility regulation was neither "inherently suspect nor an encroachment on a fundamental right," but rather it was grounded in and reasonably related to a legitimate state interest. The court found that the regulation had been developed in response to a need to insure fair competition and to minimize the hazard of having the usual high-school athlete compete with older, more skilled players. The equal protection clause of the Fourteenth Amendment permitted LHSAA to deal with the problem and that even if a gap did exist in the regulations, it did not rise to constitutional proportions, the court stated.

The judgments of the district court banning enforcement of the regulation were vacated, and the matter was remanded with directions that the complaints of the students be dismissed.

Maryland

Cornwell v. State Board of Education
314 F.Supp. 340
United States District Court, D. Maryland,
August 22, 1969.

Certiorari denied, 91 S.Ct. 240, December 7, 1970.

Parents and school children of Baltimore County, Maryland, sued the state board of education, seeking to prevent the implementation of a program of sex education in the county schools. Particularly the plaintiffs sought to have the court declare unconstitutional a bylaw of the state board which made it the responsibility of each local school system in the state to provide a comprehensive program of family life and sex education in all elementary and secondary schools as an integral part of the curriculum, including a planned and sequential program of health education. The parents alleged that this bylaw violated the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment. The state board of education sought to dismiss the complaint.

The parents had not asked for a three-judge federal court to decide the constitutional questions, but the court treated the case as one in which a three-judge court had been requested and the suit referred to one judge to make the initial determination as to whether there was a substantial constitutional question. If the court did not find a substantial constitutional question, the suit could be dismissed.

The court found no substantial constitutional issue in the argument of the parents that they were denied due process and equal protection of the laws. The court held that the bylaw was validly adopted and uniformly enforced in that it applied to all school children in the state. The parents had asserted that the bylaw was adopted because of a study made in reference to pregnant pupils but that it applied to both pregnant and nonpregnant pupils. The court found no logic in this argument and said that there would appear to be valid reasons for teaching a program of sex education to both groups.

Parents also argued that they had the exclusive constitutional right to teach their children sex in their homes and that this exclusive right precluded the teaching of sex education in the schools. The court found no authority nor constitutional right for this "novel proposition."

In support of their First Amendment claim, the parents asserted that they had been denied the free exercise of their religious concepts and that the teaching of sex in the schools would in fact establish religious concepts. Because of this argument the court reviewed Supreme Court pronouncements in the area of religion in the schools. In applying the principles established in these cases and the *Schempp* test of permissible government activity to the instant care, it was clear to the court "the purpose and primary effect of the bylaw here is not to establish any particular religious dogma or precept, and that the bylaw does not directly or substantially involve the state in religious exercises or in the favoring of religion or any particular religion." The court said that the bylaw was a public health measure and that the state's interest in the health of its children outweighed claims based upon religious freedom and the right of parental control.

The court concluded that the federal question presented under the First and Fourteenth Amendments was plainly insubstantial and granted the motion of the state board of education to dismiss the complaint.

NOTE: On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the decision of the lower court to dismiss the complaint. (428 F.2d 471, (1970)) The Supreme Court of the United States declined to hear an appeal.

Michigan

Bond v. Public Schools of Ann Arbor School District
178 N.W.2d 484
Supreme Court of Michigan, July 17, 1970.

Parents sued the Ann Arbor school district on behalf of themselves and all other parents of children in the elementary and secondary schools of the district. They sought a judgment requiring the district to permit all qualified children to enroll and attend school without payment of any fees or the purchase of any books, supplies, or equipment incident to any portion of the curriculum or other recognized school activity. They also asked for an injunction against the collection of any fees and the requiring of the purchase of any books, supplies, or equipment, and a refund of fees already illegally paid. The parents conceded that no children were refused admission to the schools for failure to pay the fees but charged that large amounts of money were illegally collected. The parents also challenged the legality of the school district action in collecting money for a materials ticket for specialized courses such as photography, art, home economics, and industrial arts and imposing interscholastic fees.

The trial court ruled that the general fees, material charges, and interscholastic athletic fees were illegally collected and enjoined any further collection; however, no refund was permitted. The trial court refused relief in the case of the textbooks, miscellaneous supplies, and equipment. The state appellate court affirmed this decision, and the parents appealed on the issue of the textbooks and supplies and the denial of refunds of general fees aggregating over $140,000.

The parents' suit was based on a provision of the state constitution which reads in part that "the legislature shall maintain and support a system of free public elementary and secondary schools as defined by law." Because of a lack of specific discussion at the constitutional convention of 1961 of the meaning of the word "free," the lower courts concluded that the word did not mean free textbooks and school supplies. The state supreme court disagreed, stating that the provision clearly means "without cost or charge and must have been so commonly understood by the people." The higher court then discussed whether books and supplies are necessary to a system of free public schools, and held that they are an essential element of free public elementary and secondary schools.

On appeal, the parents waived claim of refund for all but the general fees charged since the suit was instituted. The trial court had denied recovery on the theory that the parents had not brought a class action, that it would be administratively inconvenient for the district to refund the money, that it would cost too much money, and that the school district had acted in good faith.

The state supreme court held that the parents had brought a class action and that inconvenience and cost were not a bar to recovery. It also held that the school district had not acted in good faith since the parents had repeatedly sought to enjoin the collection of the fees since the suit was commenced in 1966 and that the state attorney general had ruled in 1964 that registration fees and charges for participation in some courses was unconstitutional. The fact that the fees had already been spent by the school district and that the amount of refund to each parent was relatively small, the higher court said, was not determinative of the issue. The case was remanded to the lower court with directions that a judgment be entered against the school district for the amount of the general fees collected since suit was begun and that from this fund the parents' attorneys should be paid and the remainder distributed to the parents of children in the school district.

The judgments of the lower courts were reversed insofar as they upheld the requirement of fees for the purchase of books and supplies and denied recovery of fees unconstitutionally collected.

Mississippi

Molpus v. Fortune
311 F.Supp. 240
United States District Court, N.D. Mississippi, W.D.,
March 31, 1970.

Student members of the University of Mississippi chapter of the Young Democrats (UMYD) sought a preliminary injunction to require the university to approve the club's request to invite a speaker.

In *Stacy v. Williams* (see p. 98 of this report), the court had promulgated rules concerning guest speakers which applied to all state institutions of higher education in Mississippi. Pursuant to these rules, the UMYD submitted to the chancellor of the university their request to invite Tyrone Gettis. Following disapproval of the request, the students appealed to the Campus Review Committee. By a vote of 4 to 1 this committee also disapproved the request. The students then filed this suit seeking an injunction to force the university to approve the request to invite Mr. Gettis and an injunction restraining the university from further interference with the rights of the students to hear speakers of their choice. Because the *Stacy* case was then pending before the appellate court, the district court in this action ruled that it could consider only the propriety of the refusal of university officials to permit UMYD to invite the speaker on campus and to allow him to speak.

The rules provided for a *de novo* consideration of the request by the Campus Review Committee but since in this case the committee did not make a record of the proceedings before it, the court afforded the students a *de novo* hearing on their request. The court concluded that since the rules constituted a system of prior restraints on the rights of the sponsoring group in the exercise of First Amendment rights of assembly and free speech, the burden was on the university to show by clear and convincing evidence that the speech of Mr. Gettis would constitute "a clear and present danger" to the orderly operation of the university because of the speaker's advocacy of "the willful damage and destruction, or seizure and subversion, of the buildings or other property of the University; or the forcible disruption or impairment of, or interference with, the regularly scheduled classes or other educational functions of the University, or the physical harm, coercion, intimidation, or other invasion of lawful rights, of the officials, faculty members or students of the University; or some other campus disorder of a violent nature."

The evidence showed that the scheduled speaker was or is president of the student body of Mississippi Valley State College, an all-black institution of about 2,000. That school had been troubled by disorders, and there was evidence that Mr. Gettis was one of the leaders of the demonstrations that had taken place there. The University of Mississippi, on the other hand, had fewer than 200 black students out of a student enrollment of over 6,000. There had been two or three incidents of a minor nature involving black students on the campus. Because of the actions of Mr. Gettis at his state college and because of the black student unrest at the University, the chancellor had determined that the proposed speech of Mr. Gettis would constitute a "clear and present danger" to the operation of the University.

The students had presented evidence that Mr. Gettis intended to speak on a student's viewpoint of the crisis at his college and had assured the UMYD attorney that his speech would be devoted entirely to this topic. The students presented other witnesses who testified that the appearance of the speaker would not constitute a danger to the University. The school officials introduced testimony of the opposite view.

Considering the evidence in its entirety, the court concluded that the appearance of Mr. Gettis on the campus would not present a clear and present danger to the orderly operation of the university since he intended to limit his speech to the crisis at his college. However, even if he extended his remarks to advocate destruction or damage to university property or other disorders, the court concluded, there was little likelihood that this would occur considering the nature and racial composition of the student body at the university.

The court was of the opinion that the Campus Review Committee was incorrect in denying the request by UMYD to issue the invitation to Mr. Gettis. Its decision was reversed, and university officials were directed to approve the request.

Stacy v. Williams
306 F.Supp. 963
United States District Court, N.D. Mississippi, W.D.,
December 1, 1969.

Various campus organizations at the University of Mississippi and Mississippi State University, as well as a faculty association and other persons, sued the Board of Trustees of the Institutions of Higher Learning of the State of Mississippi, challenging its regulations for off-campus speakers. The three-judge district court ruled that the regulations were unconstitutionally vague. New regulations subsequently adopted by the board were now before the court. The court found all essential elements of the second set of regulations either invalid for vagueness under the due process clause or in clear violation of the free speech and assembly provisions of the First and Fourteenth Amendments as well as the equal protection clause of the Fourteenth Amendment.

The court reviewed the controlling constitutional principles in the area of university speaker bans and formulated general guidelines for off-campus speaker regulations. The court noted that by their very nature speaker regulations are prior restraints upon freedom of speech and assembly, and to withstand constitutional attack they must be narrowly drafted so as "to suppress only that speech which presents a 'clear and present danger' of resulting in serious substantial evil which a university has the right to prevent." To satisfy this clear and present danger test, the court, quoting from a Supreme Court case, said there must be a finding by proper authority "either that immediate serious violence (or other substantive evil) was to be expected or was advocated, or that the past conduct furnished reasons to believe such advocacy was then contemplated."

Within the framework of the controlling constitutional principles, the court held that speaker regulations may validly require that the invitation come from a recognized student or faculty group and that certain information concerning the speech and speaker be supplied within a reasonable time beforehand. The regulations may also provide that the invitation shall not issue unless approved by the executive head of the institution. However, the approving authority must observe the aforementioned standards, and a prompt review of the decision of the executive head must be provided. The court also held it essential that procedural due process be built into the regulations to avoid the possibility of censorship, arbitrary decision, or unbridled discretion. The language of the regulations must preclude only that speech which comes within the doctrine of clear and present danger. With respect to "advocacy" the regulations must be clear that the advocacy prohibited must be of the kind which prepares the audience addressed for "imminent action and steels it to such action, as opposed to the abstract espousal of the moral propriety of a course of action by resort to force." There must also be a reasonable apprehension of imminent danger to the university and its functions and purposes, including safety of property and persons. In closing, the court reminded university officials that their power to decide what speakers students may invite to campus must be exercised in good faith, upon relevant inquiry be consistent with constitutional principles, and be subject to adequate review if the speech is denied.

The court reviewed the second set of regulations of the board of trustees and found them inadequate in light of the foregoing discussion. The court fashioned its own set of speaker regulations which were to be in force and effect until repealed by the board of trustees. The court said that the board could repeal them since it was not required to have any speaker rules at all, but if the board did repeal the court regulations, no new regulations could be adopted unless in conformity with the order of the court.

Stacy v. Williams
312 F.Supp. 742
United States District Court, N.D. Mississippi, W.D.,
March 9, 1970.

(See case immediately above.)

The Board of Trustees of the Institutions of Higher Learning of the State of Mississippi adopted the regulations set out by the court for campus speakers in the case above. This suit involved the first application of those regulations. The Young Democratic Club at Mississippi State University sought to invite Charles Evers, a black civil rights leader, to speak on campus. According to the regulations, a request was submitted to the president of the university who approved the invitation after consulting other administrators and investigating the conduct that followed remarks by Evers at other institutions. The university authorities concluded that the speaker did not present any physical threat to the university. Following approval of the invitation the board of trustees indicated to the university president that it disapproved of the invitation and directed him to rescind it. He did so, and the students appealed to the campus review committee as provided for in the regulations. That committee held a meeting and voted 4 to 1 to approve the invitation and reversed the action of the university president. The following day the board of trustees again notified the president that it disapproved, overruled the decision of the campus review committee, and ordered that the speech not take place. The student group sought judicial review of that decision.

It was the position of the board of trustees that although it had adopted the court-promulgated regulations, it still had the inherent power to pass upon the suitability of any speaker, and in the board's judgment the university administrators and the campus review committee had failed to give proper weight to the speaker's past record for violence or disruptive conduct on other campuses.

The uniform rules adopted by the board provided that the president of the institution shall make an inquiry into the suitability of the speaker. This was done by the president, and the request was granted. The rules further provided that if the request is denied, which was the case here, the student group may appeal to the campus review committee. This committee is composed of representatives of the faculty and the student body; the student members are the president and the secretary of the student body, and the faculty members are chosen by the chairman of the board of trustees. In this instance the committee met and voted to grant the invitation. According to the uniform rules of the court the decision of this committee is final, subject to judicial review if sought. Thus, the court noted the student group had acted strictly in accordance with the regulations, as did the campus authorities.

The board of trustees argued that it must retain the final authority to prevent inadequate consideration being given to the matter or a wrong decision being made by the campus authorities. The court said that if the campus authorities had acted contrary to the clear evidence in the application of the speaker rules, the board could seek judicial review. But in this case the board did not seek judicial relief, and had chosen "unilaterally to cancel and reverse serious and meaningful determinations." The court held that the board did not have the power to override what the court said were the constitutional requirements of free speech. A temporary restraining order was issued against the board preventing it from interferring in any way with the scheduled speech of Charles Evers on the Mississippi State University campus.

New York

Grier v. Bowker
314 F.Supp. 624
United States District Court, S.D. New York,
June 22, 1970.

Community college students who wished to attend summer sessions at either a senior college of the City University or a community college of the State University brought suit to enjoin the collection of summer school tuition charge applicable to them but not to senior college students. They alleged that charging $10 per credit hour to matriculated community college students only was discriminatory and a violation of the equal protection clause of the Fourteenth Amendment. Suit was brought shortly before the commencement of the summer session, and the defendant Chancellor of the City University and the New York City Board of Higher Education agreed to allow the students to attend tuition free pending the outcome of the suit.

At the outset the court noted that a preliminary injunction is an extraordinary remedy used to preserve the status quo and can be issued only upon a showing of irreparable injury and a clear probability of success in a trial on the merits. Looking at the students' chances of success, the court said that judicial examination of government-created classifications is limited to a determination of whether the unequal treatment is based upon a reasonable distinction having some rational relationship to legitimate public policy. Some interests of the individual, however, have been deemed so fundamental that any state-imposed discrimination is justifiable only by a compelling state interest.

The students asserted that equality of educational opportunity falls within this area of fundamental rights, and, therefore, it was incumbent upon the state to establish a compelling interest for the continuation of tuition charges for community college students since the indigent student was adversely affected. The court reviewed the cases cited by the students in support of their contentions and found that the right to attend college summer sessions without the payment of tuition was not analagous to the rights involved in those cases. The court said that the classification does not directly deny educational opportunities to the indigent community college student who is provided regular courses during the winter terms without payment of a per-credit fee. Furthermore, substantial members of the group who could not afford the $10 fee could attend free of charge by virtue of their enrollment in a senior branch of the city university.

The court concluded that the students had failed to show a probability of success on the merits. The court also found a rational reason for the distinctions made between the community and senior college students, and, therefore, the classification was neither arbitrary nor invidious. The community colleges of the state university system and the city university of New York, the court noted, are by statute financed in different ways, and this provides a rational basis for the different treatment of summer session students. After the deduction of fees collected, the balance remaining to be financed in the senior college system is shared equally by the state and the city while the city alone is responsible for a balance in the cost of financing the community college system, after the set amount it receives from the state. This difference in funding requires the city to pay one-half of the cost of avoiding summer tuition at the senior colleges but the full cost if it eliminated the tuition fee at the community colleges. Thus, it was neither irrational nor arbitrary for the city to attempt to double the effectiveness of each of its educational dollars by the summer school tuition policy.

The court concluded that granting the students a preliminary injunction would not preserve the status quo pending litigation. Rather, it might seriously disrupt the operation of the summer sessions.

The preliminary injunction requested by the students was denied.

Kaplan v. Allen
311 N.Y.S.2d 788
Supreme Court of New York, Special Term,
Albany County, June 4, 1970.

A graduate student sought a court order to compel the state commissioner of education to grant her a Regents Graduate Teaching Fellowship for the 1969-70 school year. The fellowship had originally been granted and then withdrawn on the ground that the student failed to qualify as a resident of New York.

The student's claim to state residency as of September 1, 1968, was a lease for an apartment in the state dated August 12, 1968. The state argued that the student had voted in New Jersey in November 1968, had not filed New York State tax returns for 1968, and had renewed her New Jersey driver's license in March 1969.

The court noted that residency in the state does not absolutely entitle an applicant to a fellowship. The court held that in light of the thousands of other applications for the grants, the commissioner had not acted arbitrarily in denying a grant to a student with a doubtful claim to residency. The petition of the student was dismissed.

Overton v. Rieger
311 F.Supp. 1035
United States District Court, S.D. New York,
April 6, 1970.

Certiorari denied, 91 S.Ct. 1230, March 29, 1971.

(See ***Pupil's Day in Court: Review of 1968***, p. 60; ***Review of 1969***, p. 80; ***People v. Overton.***)

A student who had been adjudicated a youthful offender in 1966, and sentenced to indefinite probation up to five years, sought a writ of ***habeas corpus***. He charged that the evidence against him was illegally seized from his school locker opened for police by the vice-principal after being told by police that the locker was suspected of containing and in fact did contain marijuana and after the vice-principal was shown what is conceded to have been an invalid search warrant.

The student was discharged from probation when a lower state court held that the evidence was illegally seized. In subsequent judicial action the highest state court ruled that the evidence was admissible, and ordered the lower court to proceed according to the determination upholding the conviction. However, at no time had the Probation Department considered the discharge from probation as anything but final.

The first question considered by the federal court was whether or not the boy was in "custody" for purposes of federal ***habeas corpus***. This was decided in the affirmative despite the apparent discharge from probation. The federal court held that the discharge from probation was an erroneous interpretation of the initial order of discharge and could not be determinative of the question of custody. The court also held that probationary restrictions and the threat of incarceration for violation of probation constituted custody for federal ***habeas corpus*** purposes.

Turning to the merits of the case, the federal court held that the state courts were correct in holding the evidence admissible regardless of the invalid search warrant. The federal court stated that the school principal had the power to consent to the search in view of the affirmative obligation of school authorities to supervise children entrusted in their care and consequent retention of control by them over the lockers. The state court had found and the federal court agreed that the vice-principal had freely given consent to the search of the student's locker and had not done so under compulsion of the invalid warrant.

The federal court concluded that the proper constitutional standard had been applied and accordingly denied the application for a writ of ***habeas corpus***.

NOTE: The Supreme Court of the United States declined to hear an appeal from this decision.

Silver v. Queens College of the City University
311 N.Y.S.2d 313
Civil Court of the City of New York, Queens County,
Small Claims Part, May 12, 1970.

A graduate student brought suit to recover an alleged overcharge in tuition at Queens College of City University. The student had pre-registered for the fall semester and paid the then applicable charges. Subsequently the board of higher education increased the fees at all units of the City University. The student was sent an adjusted bill for the increased tuition which he paid "under protest."

The court held that the language and figures set forth in the published curricula which set forth no other reservations or conditions, constituted a firm offer on the part of the college. When the student registered and paid his tuition, he accepted that offer. This constituted a valid contract. The college argued that tuition charges are dependent on budgetary allotments which are often late in coming from the city and that the student is subject to any subsequent action taken on tuition charges. The court said that these reasons could not affect the contract as it existed between the college and the student. The student was granted a judgment for the amount of the overcharge.

Stringer v. Gould
314 N.Y.S.2d 309
Supreme Court of New York, Special Term,
Albany County, September 16, 1970.

Students sought an order directing the Board of Trustees of the University of the State of New York to rescind its resolution regarding a mandatory student activity fee or in the alternative to prescribe guidelines for disbursement of the funds collected under the resolution by prohibiting their use for certain alleged unauthorized purposes. The resolution in question authorized the student government at each state-operated campus to impose an annual fee for the support of programs of an educational, cultural, recreational, and social nature. The resolution also provided that each student be required to pay the fee on registration, and where this was not done, it authorized the withholding of grades or transcripts.

The trustees argued that they had authorized the various student bodies to impose the fees and that they had no voice or control over expenditure of the funds. The court disagreed with this argument in view of the fact that the fee was mandatory and sanctions could be imposed on those students who failed to pay the fee. Therefore, the trustees did have control over the funds and they could be spent only for those purposes set out in the resolution. The court enjoined the student governments from spending any more money of the fund or from appropriating any additional money from the fund for extracurricular student activities without first obtaining the determination and approval of the trustees as to whether the proposed activities were educational, cultural, recreational, or social in nature.

Texas

Passel v. Fort Worth Independent School District
453 S.W.2d 888
Court of Civil Appeals of Texas, Forth Worth,
April 17, 1970; rehearing denied May 15, 1970.
Appeal dismissed, 91 S.Ct. 1667, May 17, 1971.

(See *Pupil's Day in Court: Review of 1969*, p. 82; *Review of 1968*, p. 61.)

High-school members of a "charity club" brought a class action to have a portion of the state penal code and a regulation of the school district adopted pursuant to the statute declared unconstitutional. The trial court had dismissed the action. This dismissal was affirmed by the appellate court, then reversed and remanded by the state supreme court. On remand the trial court again entered a decision adverse to the students, and they appealed.

The statute and regulation in question prohibits high-school students from joining sororities, fraternities, and secret societies (including charity clubs). The school board required the parent or guardian of each junior and senior high-school student to sign a supplementary application for enrollment certifying that his son or daughter was not a member of any prohibited organization and would not join the same. Organizations that admit any pupil in the school who is qualified by the rules of the school to fill the special aims of the organization are not subject to the regulation. The organizations that the pupil-plaintiffs in this action belong to are not exempt.

The trial court had found that the activities of these barred charity clubs "have substantially and materially disrupted and affected the operation of . . . high schools" in the school district. The trial court concluded that the students had failed to show by a preponderance of the evidence that the legislature had no reasonable basis for the classification established by the law. Further, the classification did not constitute an unlawful discrimination against the student-plaintiff.

The appellate court examined the record from the trial court and held that there was ample evidence to support each of its findings and its judgment.

The higher court concluded that the statute was constitutional. It also found that the students were not deprived of any constitutional right by the operation of the regulation and that the regulation, like the statute was constitutional. The judgment of the trial court was affirmed.

NOTE: The Supreme Court of the United States declined to hear an appeal from this decision.

Virginia

American Civil Liberties Union of Virginia, Inc. v. Radford College
315 F.Supp. 893
United States District Court, W.D. Virginia,
Roanoke Division, August 5, 1970.

Students at Radford College, a state institution, sought to gain recognition as a campus chapter of the American Civil Liberties Union (ACLU). The Radford College Senate denied the recognition, and the students brought suit charging denial of their First and Fourteenth Amendment rights and seeking declaratory and injunctive relief. The college moved to dismiss the action for failure to state a claim.

In attempting to become recognized, the students had followed the procedures outlined in the college handbook. The Committee on Clubs and Organizations, composed of students and faculty members, had voted unanimously to approve the application. The matter then proceeded to the college senate, composed solely of faculty and administration members. The college senate twice tabled the matter and asked the aforementioned committee to formulate criteria for the recognition of campus organizations. This was done and the report was modified somewhat by the senate ad hoc committee on formation of new campus organizations. The senate then voted not to recognize the ACLU as a campus organization. According to the report of the senate ad hoc committee, recognition entitled an organization to the use of campus publicity, sponsorship of campus activities, and the use of college facilities, but nonrecognition did not necessarily preclude the use of such facilities. It was shown that the college had recognized, among other groups, local chapters of the Young Republicans and Young Democrats.

The court said that what was involved was the right of interested students on the Radford campus, some of them ACLU members, to form a chapter of the ACLU and gain official college recognition, and, therefore, ACLU had the right to assert this right for its members. The court noted that student organizations do not enjoy an unrestricted right to be recognized but that court cases make clear that once a college has made facilities and activities available to the students, it must do so in a manner in accord with First Amendment principles. The college contended that it had not denied the use of its facilities to ACLU, it merely refused to recognize the group as an official campus organization. The court said that the argument that the ACLU group might operate successfully without campus recognition was not controlling since "it is the character of the right, not of the limitation" that is important.

The senate resolution denying recognition had found that the role and purpose of the ACLU lies "basically outside the scope and objectives of this tax supported educational institution." The court found this statement so vague that it could only speculate on what the objectives of the college might be. To say that the "role and purpose" of the Young Republican and Young Democratic clubs were within the "scope and objectives" but that the ACLU is without, the court stated, did not seem to treat with equality the petition of the ACLU students. The court noted that other Virginia tax-supported institutions had chapters of the ACLU on campus and that recognition of the group did not commit the college to adopt or agree with any or all of the group's contentions.

The court ruled that the ACLU students had a right to be recognized as a campus organization.

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